Raising the Bar:

Civil Rights, the New Jersey Supreme Court, and the ACLU

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Relevant Briefs & Opinions

STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY, Appellant, v. STATE OF NEW JERSEY, GURBIR S. GREWAL, in his capacity as ATTORNEY GENERAL, COLONEL PATRICK J. CALLAHAN, in his capacity as SUPERINTENDENT of the DIVISION OF STATE POLICE, and the DIVISION OF STATE POLICE, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-3950-19 Civil Action Transferred from Mercer County to the Appellate Division via Order signed by Hon. Mary C. Jacobson, A.J.S.C.

BRIEF AND APPENDIX OF PROPOSED *AMICI CURIAE* ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AND NEW JERSEY STATE OFFICE OF THE PUBLIC DEFENDER

Lawrence S. Lustberg (023131983)
Michael R. Noveck (901172012)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Counsel for Amici Curiae

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PRELIMINARY STATEMENT

The criminal justice process is fundamentally a search for the truth. And in many criminal cases, the core issue for determining the truth is the credibility of police witnesses. Did the accused defendant actually possess drugs, or was the contraband planted by cops? Was the defendant resisting arrest, or was he subjected to police brutality? Did the police officer properly arrange the eyewitness identification procedure, or did he commit an error that could lead to a wrongful identification? One need not look far to find numerous examples of cases in which police officers have lied or misled about significant, material facts that have resulted in acquittals at trial or prosecutorial decisions not to charge, or even convictions that were vacated following a wrongful jury verdict or coerced guilty plea as a result of police misconduct.

It is unsurprising, then, that criminal defense lawyers undertake substantial efforts to challenge the credibility of police officers who testify at criminal trials. Such challenges are critical at every phase of a criminal case: when a prosecutor decides whether to bring criminal charges or what charges to bring; at pretrial detention hearings; with respect to motions to suppress evidence or other pre-trial motions; when a jury adjudicates guilt or innocence; and even at the stage of post-conviction relief based on newly discovered evidence or violations of the prosecution's disclosure obligations. And it is clear that an officer's prior misconduct can be relevant — indeed, critical — evidence going to

his or her credibility. In fact, recent changes to the New Jersey Rules of Evidence, effective this very month, have expanded the circumstances under which a witness's credibility can be challenged based upon specific instances of prior misconduct.

But criminal defense lawyers who seek discovery of an officer's prior disciplinary records face a significant roadblock: the lack of transparency around police disciplinary records, which prevents linking known instances of police misconduct to specific police officers. Criminal discovery rules, as interpreted by this Court, have been held to limit the availability of police disciplinary records unless the defense can make a showing that the records may reveal relevant information. Without being able to link instances of misconduct to particular officers, criminal defense lawyers are hard-pressed to bear this burden.

Against this backdrop, Appellant challenges two Attorney General Directives that will in fact link instances of misconduct to the names of specific police officers. The Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") and the New Jersey State Office of the Public Defender ("OPD"; collectively, "*Amici*") respectfully submit this brief *amici curiae* urging the Court to uphold the Directives because they will further the ability of criminal defendants, and their attorneys, to seek the truth at trial by challenging the credibility of police witnesses. That is because once criminal defense lawyers can link police witnesses to their specific acts of misconduct, they will be able to make the showing sufficient to permit discovery of police

disciplinary records, which will, in turn, be highly probative of the officer's credibility and could very well make the difference in securing a defendant's release from pre-trial detention, avoiding a prosecution, or preventing a conviction by demonstrating that there is not, in fact, proof of guilt beyond a reasonable doubt. Meanwhile, trial judges retain discretion through tools like protective orders and evidentiary rulings to ensure that the Directives will not result in improper disclosure of information or frivolous fishing expeditions.

In sum, the Attorney General's Directives are not arbitrary and capricious, and thus are lawful in part because by permitting criminal defense lawyers to fully probe a police officer witness's credibility, they enhance the truth-seeking function of the criminal justice process. Moreover, because this evidence is relevant to proceedings that occur every single day in the criminal courts of New Jersey, a stay of the Directives would have the effect of concealing evidence of police misconduct and thus would work ongoing, substantial harm not only to criminal defendants, but also to the administration of a fair criminal justice system, which the Attorney General is charged with protecting. The ACDL-NJ and OPD thus respectfully urges this Court to reject the Appellant's challenge to the Directives, as well as its request for a stay.

INTEREST OF *AMICI CURIAE*

Amici participate in this case in order to explain to the Court the salutary impact that the Attorney General's Directives

will have on the capacity of the criminal justice system to achieve fair and accurate results, and particularly how the Directives will allow criminal defendants and their attorneys to effectively test the credibility of police officer witnesses who have engaged in previous acts of misconduct. *See Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965) (noting that *amici* help "assure [the Court] that all recesses of the problem will be earnestly explored"). *Amici*'s participation is particularly appropriate because this is a case with "broad implications," *Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 17 (1976), in which *Amici*'s "participation will assist in the resolution of an issue of public importance." R. 1:13-9.

Amicus curiae ACDL-NJ is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good[.]" *ACDL-NJ By-Laws*, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders.

Over the years, the ACDL-NJ has participated as *amicus curiae* in cases specifically involving questions that bear upon a criminal defendant's right to discovery of potentially exculpatory

evidence. *See, e.g., State v. Scoles*, 214 N.J. 236 (2013) (holding that defense must have access to images in child pornography prosecution, subject to appropriate protective order); *State v. Cohen*, 431 N.J. Super. 256 (App. Div. 2009) (same); *see also State v. Hernandez*, 225 N.J. 451 (2016) (considering defense's right to discovery of evidence regarding cooperating witness). The ACDL-NJ has further filed *amicus* briefs in cases regarding the appropriate scope of cross-examination of witnesses. *See, e.g.*, *State v. Jackson*, --- N.J. ---, 2020 WL 3579673 (2020) (reversing conviction based on improper limitation into cross-examination concerning cooperation witness's plea bargain); *State v. Castagna*, 187 N.J. 293 (2006) (reversing conviction based on improper limitation into cross-examination concerning result of witness's polygraph test). And the ACDL-NJ has appeared as *amicus curiae* in numerous other cases in this Court and in the Supreme Court. *See, e.g., State ex rel. A.A.*, 240 N.J. 341 (2020); *State v. L.H.*, 239 N.J. 22 (2019); *State v. Cassidy*, 235 N.J. 482 (2018); *State v. Lunsford*, 226 N.J. 129 (2016); *In re State Grand Jury Investigation*, 200 N.J. 481 (2009); *State v. Osorio*, 199 N.J. 486 (2009); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019); *State v. Jackson*, 460 N.J. Super. 258 (App. Div. 2019), *aff'd o.b.*, --- N.J. ---, 2020 WL 1541100 (2020); *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). Indeed, on various occasions, the ACDL-NJ affirmatively has been requested to file *amicus* briefs on matters of importance to the Court. *See, e.g.*, *State v. Bishop*, 429 N.J. Super. 533 (App. Div. 2013).

Amicus curiae OPD represents the overwhelming majority of people facing criminal prosecution by the State. The first centralized system of its kind in the United States, the OPD was founded on July 1, 1967, to create an established system by which no innocent person will be convicted because of an inability to afford an attorney. In its criminal-defense function, the OPD not only provides legal counsel at the Superior Court trial level in each of the state's 21 counties, but also handles appeals and other ancillary legal proceedings. Given the OPD's commitment to ensuring that the guilty will be convicted only after a fair trial, it is likely that the Office of the Public Defender does and will represent many of the criminal defendants seeking to challenge the credibility of police officer witnesses who have engaged in previous acts of misconduct.

OPD has appeared as *amicus curiae* in numerous other cases in this Court and in the Supreme Court. *See, e.g.*, *State v. Medina*, ___ N.J. ___, 2020 N.J. LEXIS 673 (2020) (confrontation clause); *State v. A.M.*, 237 N.J. 384 (2019) (waiver of *Miranda*); *State v. Pinkston*, 233 N.J. 495 (2018) (whether defendant may call adverse witnesses at detention hearing); *State v. Alexander*, 233 N.J. 132 (2018) (lesser-included jury instructions); *State v. S.N.*, 231 N.J. 497 (2018) (pretrial detention); *State v. J.R.*, 227 N.J. 393 (2017) (scope of CSAAS testimony); *State v. J.M.*, 225 N.J. 146 (2016) (404(b) evidence); *State v. Pena-Flores*, 198 N.J. 6 (2009) (motor-vehicle searches); *State v. Romero*, 191 N.J. 59 (2007) (cross-racial IDs); *State v. Moore*, 188 N.J. 182 (2006)

(hypnotically refreshed testimony); *State v. Natale*, 184 N.J. 458 (2005) (sentencing); *State v. J.M.*, 182 N.J. 402 (2005) (whether juvenile can present evidence at waiver hearing); *State v. P.H.*, 178 N.J. 378 (2004) (CSAAS and fresh complaint); *State v. Garron*, 177 N.J. 147 (2003) (Rape Shield Law); *State v. Carty*, 170 N.J. 632 (2002) (consent car searches); *State v. Stovall*, 170 N.J. 346 (2002) (investigative stop at airport); *State v. Stott*, 171 N.J. 343 (2002) (search in hospitals); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019) (use of body-wires to record defense counsel); *State v. Brown*, 456 N.J. Super. 352 (App. Div. 2018) (strip searches); *State v. Stewart*, 453 N.J. Super. 55 (App. Div. 2018) (whether defendant may call adverse witnesses at detention hearing).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Briefly stated, this case, and several others pending before this Court, involve challenges to Attorney General Directives 2020-5 and 2020-6 (the "Directives"), which, in substance, (1) require all law enforcement agencies to publish the names of officers who receive "major discipline," which includes suspensions of more than five days, reductions in rank, and terminations, *see* Certification of Wayne D. Blanchard ("Blanchard Cert."), Exhibit A (Directive 2020-5); and (2) require the New Jersey State Police ("NJSP"), Division of Criminal Justice ("DCJ"), and Juvenile Justice Commission ("JJC") to disclose, by July 15, 2020, the names of law enforcement officers who received major discipline over the past twenty years, *see* Blanchard Cert.,

Exhibit C (Directive 2020-6). This is an important development: currently, the NJSP, through its Office of Professional Standards ("OPS"), releases an annual report that includes, among other things, a synopsis of major discipline imposed, which includes a description of the incident and the resulting disposition. However, that information is anonymized, such that there is no means of linking a specific officer to their acts of misconduct. *See, e.g.*, *N.J. State Police Office of Prof. Stds. Annual Report 2017* 13-16, https://www.njsp.org/information/pdf/2017_OPS_Annual_Report.pdf (report of disciplinary action referring only to "[m]ember" as being disciplined, without a name).

Appellant in this case, as well as several other related pending cases, now challenges the Directives as a final agency action and seek a stay of their implementation. *Amici* file this brief in support of the Attorney General's position, in opposition to a stay.[1]

[1] In addition to this case, there are currently four other cases pending before this same panel: (1) *State Troopers Non-Commissioned Officers Association of New Jersey, et al. v. State of New Jersey, et al.*, Docket No. A-003975-19T4; (2) *Policeman's Benevolent Association Local Number 105, et al. v. State of New Jersey, et al.*, Docket No. A-003985-19T4; (3) *New Jersey Superior Officers Law Enforcement Association v. Attorney General of New Jersey*, Docket No. A-003987-19; and (4) *New Jersey State Policeman's Benevolent Association, et al. v. Gurbir S. Grewal, Attorney General State of New Jersey*, Docket No. A-004002-19. *Amici* rely on the arguments in this brief in all five cases.

ARGUMENT

I. THE DIRECTIVES PROMOTE DISCOVERY IN CRIMINAL CASES OF PRIOR POLICE MISCONDUCT, WHICH IS ADMISSIBLE, RELEVANT EVIDENCE REGARDING AN OFFICER'S CREDIBILITY, PARTICULARLY IN LIGHT OF RECENT CHANGES TO N.J.R.E. 608.

Numerous criminal cases hinge largely, if not entirely, on the credibility of police officer witnesses. That credibility may be undermined by evidence of police misconduct, of which there are so many examples, which have led to improper criminal prosecutions and wrongful convictions. And this evidence of a police officer's misconduct may engender directly exculpatory evidence, but in any event will certainly affect the credibility of critical police testimony, particularly in light of recent changes to the Rules of Evidence permitting cross-examination regarding specific previous instances of misconduct. However, the Attorney General's current practice of allowing the release only of information that does not connect instances of misconduct to specific, named officers inhibits criminal defendants from obtaining discovery of that information, because courts require a showing that there will be relevant materials in a police disciplinary file before ordering its disclosure. Thus, by requiring the identification of officers who have been disciplined, the Directives serve the valuable role of allowing defense counsel to meet the burden necessary to obtain police disciplinary files that would not otherwise be available for use in defense of criminal charges, including on cross-examination.

A. The Current Failure to Name Police Officers Who Engage in Misconduct Inhibits Discovery of Relevant Police Misconduct Records and Creates Substantial Risk of Erroneous Charges and Convictions.

The standard for defense discovery of police misconduct records is set forth in this Court's decision in *State v. Harris*, 316 N.J. Super. 384 (App. Div. 1998). *Harris* holds that "the party seeking an *in camera* inspection [of police personnel records] must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.'" *Id.* at 398 (quoting *State v. Kaszubinski*, 177 N.J. Super. 136, 141 (Law Div. 1980)). A defendant thus "shoulder[s the] burden of advancing some factual predicate that would make it reasonably likely that the information in the file could affect the [officer's] credibility." *Id.* at 399.

In practice, this standard is difficult to surmount. The threshold burden on the defendant means that where there is not "evidence that [the officer] acted in an unlawful or in an inappropriate manner toward defendant or toward any other third parties," a motion to compel production of records will be denied. *State v. Cerrone*, Docket No. A-0031-08T4, 2010 WL 3075470, at *6 (App. Div. Aug. 4, 2010).[2] But in the absence of the Attorney General's Directives, though OPS and other law enforcement agencies may describe instances of misconduct, they do not link

[2] In accordance with *Rule* 1:36-3, all of the unpublished opinions cited in this brief are reproduced in *Amici*'s appendix. No contrary unpublished decisions are known to counsel.

the misconduct to named officers, so the information publicly provided cannot be used for the purposes of obtaining relevant criminal discovery. *See, e.g.*, *ibid.* (affirming denial of discovery of internal affairs records because "[t]he record is devoid of any evidence that [officer] acted in an unlawful or in an inappropriate manner toward defendant or toward any other third parties"); *State v. Felton*, Docket No. A-0062-14T3, 2017 WL 1737906, at *8 (App. Div. May 4, 2017) (affirming denial of discovery of internal affairs records because defendant "did not present a factual basis to support his request"); *State v. Potter*, Docket No. A-1175-12T3, 2015 WL 3843309, at *14 (App. Div. June 23, 2015) (affirming denial of discovery of internal affairs records because defendant "failed to meet his burden" regarding discovery). Indeed, even a defendant who presents *some* factual basis to connect the officer to misconduct may still not obtain discovery if the factual basis is too "minimal." *See State v. Goldsmith*, Docket No. A-2496-11T1, 2013 WL 5507742, at *7 (App. Div. Oct. 7, 2013).

Yet is it clear from the OPS reports that have been provided, among other sources, *see infra*, Section I.C. (describing how various instances of police misconduct have led to dismissal of criminal cases), that misconduct bearing on the truth of criminal allegations is a continuing issue. The summaries contained in the OPS reports include, for example, findings that officers "made improper entries into an evidence ledger" or "entered false information into [a] report." *N.J. State Police Office of Prof.*

Stds. Annual Report 2017 13, 14, https://www.njsp.org/information/pdf/2017_OPS_Annual_Report.pdf. Other allegations include "providing false information on a Division report" and, perhaps most egregiously, "knowingly providing false and misleading information on an official court document." *N.J. State Police Office of Prof. Stds. Annual Report 2014* 13, 14, https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/40023/2014-ops-annual-report.pdf. This information could be used by a criminal defendant as directly exculpatory evidence, if the misconduct occurred in the underlying case. *See, e.g.*, *Forrest v. Parry*, 930 F.3d 93, 100 (3d Cir. 2019) (describing how several Camden police officers "admitted to filing false reports, planting drugs, and lying under oath in front of grand juries, at suppression hearings, and at trials," resulting in dismissal of cases in which such misconduct occurred). Or, if the officer's misconduct took place in a different case, such evidence can be used to impeach a police officer witness by demonstrating his or her character for untruthfulness. *See N.J.R.E.* 608(b), (c) (providing for use of specific prior instances of misconduct to impeach witness's credibility); *see also infra* Section I.C.4 (describing how *N.J.R.E.* 608 makes impeachment by prior misconduct relevant at a criminal trial).

Nonetheless, as it now stands, the names of the officers who committed the specified misconduct are not publicly revealed, so that a criminal defense attorney who seeks discovery about a specific officer's disciplinary records learns nothing from these

reports. It is thus not possible to use this information to develop the "factual predicate" required to obtain discovery. *Harris*, 316 N.J. Super. at 399; *see generally State v. Hernandez*, 225 N.J. 451, 467 (2016) (rejecting request for discovery of cooperating witness's involvement in prior investigations because "defendants have not made any showing" that relevant information exists).

This inability to obtain police misconduct records improperly restricts a defendant's ability to challenge the credibility of a police officer witness. Of course, it is axiomatic that a thorough cross-examination is the key method, in our legal system, for challenging, and ultimately permitting a meaningful assessment of a witness's credibility. *See State ex rel. J.A.*, 195 N.J. 324, 342 (2008) ("It has long been held that cross-examination is the greatest legal engine ever invented for the discovery of truth." (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted)). Indeed, "in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate." *United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting); *see also United States v. Riggi*, 951 F.2d 1368, 1376 (3d Cir. 1991) ("Cross-examination is the principal means by which the trustworthiness of a witness is tested."). Thus, cross-examination of this sort "serves one of the core principles of the justice system: to seek the truth by confronting and possibly

exposing a witness who may lack credibility." *State v. Scott*, 229 N.J. 469, 492-93 (2017) (Rabner, C.J., concurring).

Nor, of course, is the fundamental constitutional right of cross-examination, *see Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (holding that the Sixth and Fourteenth Amendments to the United States Constitution guarantee to a criminal defendant the right to cross-examine witnesses against him), meaningful with respect to police officer witnesses without discovery of facts in the State's possession that might be used to establish the misconduct that becomes the basis of challenges to a police officer's version of events, or to their credibility. The Directives allow defendants to link officers who are testifying against them to their prior misconduct, and thus establish the "factual predicate" needed to obtain discovery. *Harris*, 316 N.J. Super. at 399. In this way, the Attorney General's initiative, though only a first step down the road to the transparency that ought to prevail with regard to police discipline in general, *see* Press Release, N.J. Att'y Gen., *AG Grewal Issues Statewide Order*, (June 15, 2020), https://www.nj.gov/oag/newsreleases20/pr20200615a.html (quoting Attorney General as saying that "[w]e will continue evaluating other steps to promote transparency, accountability, and trust in law enforcement"), promotes the effective cross-examination of those police officer witnesses, and thus furthers the goals of truth and fairness that undergird New Jersey's criminal justice process in general. *See In re Hinds*, 90 N.J. 604, 624 (1982) ("The

State's concern for an effective, efficient, fair and balanced system of criminal justice is unquestioned.").

B. Discovery of Police Officer Misconduct Is Consistent With New Jersey's Broad, Open-File Discovery Rules and With the State's Constitutional Obligation to Produce Exculpatory Evidence.

Because the Directives promote the pre-trial discovery of police misconduct information, they comport with the expansive rights to discovery in criminal cases that have repeatedly been recognized by the New Jersey courts. Those rules promote the search for the truth and compliance with the constitutional obligation to produce exculpatory evidence, which of course includes impeachment evidence.

Thus, the New Jersey Supreme Court has confirmed that "[t]he accused in a criminal case is generally 'entitled to broad discovery.'" *State ex rel. A.B.*, 219 N.J. 542, 555 (2014) (quoting *State v. D.R.H.*, 127 N.J. 249, 256 (1992)). Indeed, "pretrial discovery in criminal trials has long received favorable treatment in this state" because it serves a "meaningful role . . . in promoting the search for truth" and "in promoting a just and fair trial." *State v. Scoles*, 214 N.J. 236, 251 (2013). New Jersey accordingly has adopted the "open-file approach to discovery in criminal matters." *Id.* at 252; *see also Hernandez*, 225 N.J. at 453 ("This open-file approach is intended to ensure fair and just trials."). The Court Rules thus "grant[] a defendant automatic access to a wide range of relevant evidence." *A.B.*, 219 N.J. at 555. Discovery generally must be provided "upon the return or

unsealing of the indictment," *R.* 3:13-3(b)(1), or at the time of making a pre-indictment plea offer, *R.* 3:13-3(a)(1).

These rules certainly apply to exculpatory evidence. *See R.* 3:13-3(b)(1) ("Discovery shall include exculpatory information or material."). Indeed, the Supreme Court has made clear that exculpatory evidence must be even provided in connection with pre-trial detention hearings that take place following the filing of criminal charges. *See State v. Robinson*, 229 N.J. 44, 60-61 (2017) (discussing *Rule* 3:4-2(c)(1)(B)). And such exculpatory evidence of course includes evidence that bears on witnesses' credibility, *i.e.*, impeachment evidence. *See State v. Hyppolite*, 236 N.J. 154, 165 (2018) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

Nor is the requirement that exculpatory evidence be produced by the State to the defense merely a matter of Court Rules but of the Constitution as well. Thus, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, establish the State's constitutionally-based "affirmative obligation to disclose evidence favorable to a defendant." *Hyppolite*, 236 N.J. at 165. And that rule obviously "encompasses evidence that the defendant might have used to impeach government witnesses." *State v. Knight*, 145 N.J. 233, 245 (1996). Indeed, as the United States Supreme Court has recognized, impeachment evidence that is "disclosed and used effectively" can "make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676; *see also Giglio v. United States*, 405 U.S. 150, 153 (1972) (holding that "nondisclosure of evidence affecting

credibility falls within" *Brady* rule because "the 'reliability of a given witness may well be determinative of guilt or innocence'" (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959))).

Thus, prosecutors have an "obligation to turn over material, exculpatory evidence to the defendant" that "extends as well to impeachment evidence within the prosecution's possession." *State v. Nash*, 212 N.J. 518, 544 (2013) (internal quotation marks and citations omitted). Significantly to this analysis, for purposes of determining what evidence is in the State's possession, a prosecutor is charged with knowledge of "any favorable evidence known to others acting on the government's behalf, including the police." *State v. Nelson*, 155 N.J. 487, 498 (1998) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

Yet it is clear that exculpatory evidence contained in internal affairs records is not being produced to the defense. *See, e.g.*, *State v. El-Laisy*, Docket No. A-1513-17T1, 2019 WL 3183647, at *2-5 (App. Div. July 16, 2019) (reversing conviction where prosecution did not disclose existence of open internal affairs investigations, where officer testified at trial that he had been "cleared" on all such investigations).[3] This is in part because under current practice, internal affairs files are kept

[3] The officer at issue in the *El-Laisy* case, Sterling Wheaten, faces federal charges based on a separate incident for civil rights violations and falsifying records. *See* Kala Kachmar, *Atlantic City K9 cop linked to $4.5M in settlements indicted by feds*, Asbury Park Press (Oct. 11, 2018), https://www.app.com/story/news/investigations/watchdog/shield/2018/10/11/atlantic-city-k-9-cop-indicted-sterling-wheaten/1607074002/.

strictly confidential, even within police departments, where only certain officers can access the records. *See Internal Affairs Policy & Procedures* § 9.5 (N.J. Att'y Gen. Dec. 2019), https://www.nj.gov/oag/excellence/docs/2019-Internal_Affairs_Policies_and_Procedures.pdf. Thus, despite the obligation to disclose this information, as a practical matter, even prosecutors may not have access to this essential information. *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743, 747 (2015) (arguing that "critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access to [police] personnel files").[4] The Directives address this problem directly by providing information to prosecutors that must then be disclosed as *Brady* material, as well as by enabling defense attorneys to request and obtain relevant records and ultimately to connect police officer witnesses to their acts of misconduct, as is necessary for them to

[4] Indeed, this reality recently attracted a great deal of attention in New York City, where defense attorneys created a database containing publicly available information about police officer misconduct. *See* Ali Winston, *Looking for Details on Rogue N.Y. Police Officers? This Database Might Help*, N.Y. Times (Mar. 6, 2019), https://nyti.ms/2HhR5XV. In response to databases like that one, the Manhattan District Attorney's office wrote to the New York Police Department to demand access to police disciplinary records, which, it noted, "is often denied to our office by the NYPD itself." Mike Hayes & Kendall Taggart, *The District Attorney Says The NYPD Isn't Telling Prosecutors Which Cops Have A History Of Lying*, BuzzFeed News (June 2, 2018), https://www.buzzfeednews.com/article/mikehayes/nypd-cops-lying-discipline-disrict-attorneys-prosecutors.

vindicate their clients' rights of confrontation and due process. In other words, the public disclosure of the names of officers subjected to major discipline will eviscerate the serious *Brady* violations that plague the system as a result of the concealment inherent in keeping records regarding misconduct of one kind of witness – police officers, often the most critical witness in trial – secret from the defense.

C. By Linking Officers to Their Specific Acts of Misconduct, the Directives Promote Discovery of Evidence That Can Be Used at All Stages of the Criminal Justice Process.

The police misconduct information that, because of the Directives, will be subject to discovery will empower all actors within the criminal justice system – not just defendants and their lawyers, but also judges and prosecutors – to make decisions based on full and complete information about the credibility of police officer allegations. Criminal cases frequently boil down to a "credibility contest" between the State's witnesses and the defendant. *See, e.g., Nash*, 212 N.J. at 550 (noting that sexual assault trial "was a classic credibility contest between the accuser and the accused"); *State v. Nelson*, 330 N.J. Super. 206, 215 (App. Div. 2000) (noting that drug possession case "was a credibility contest" between State witness and defendant). More directly, such credibility contests frequently pit defendants directly against police officer witnesses, such that the defense hinges on a defendant's claim that those witnesses are unreliable or incredible, at least to the extent of establishing reasonable

doubt. *See Robinson v. State*, 730 A.2d 181, 196 (Md. 1999) (reversing conviction because of failure to provide defense with internal affairs for cross-examination, where defendant's "credibility, as contrasted with that of the officers, was extremely important"); *B.M. v. State*, 66 So.3d 1013, 1015 (Fla. Dist. Ct. App. 2011) (reversing conviction because of failure to permit cross-examination of police witness based on internal affairs complaint, where the "case involved a 'classic swearing match' between the police and [defendant]"); *see also* Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 296 (2017) ("Despite the thousands of instances of police corruption, the criminal justice system churns on, and in many instances, convicts people based on police testimony alone."). Indeed, the credibility of police officer witnesses is at issue literally every single day in the criminal courts because, as detailed below, police misconduct information is relevant – and indeed, critical – for all stages of the criminal justice process: charging decisions, bail, pre-trial motions, trial, and post-conviction relief.

1. Charging Decisions.

Although prosecutors retain discretion in charging decisions, at the end of the day "[t]he prosecutor's 'primary duty' is 'to see that justice is done[.]'" *In re Grand Jury Request by Loigman*, 183 N.J. 133, 144 (2005) (quoting *State v. Frost*, 158 N.J. 76, 83 (1999)). A prosecutor is thus ethically prohibited "from

prosecuting a charge that is not supported by probable cause." *RPC* 3.8(a). Questions about an officer's credibility in a case could therefore persuade a prosecutor to drop criminal charges. But, of course, to the extent that prosecutors are themselves deprived of the necessary facts to make this assessment, they are left powerless to do their job; and where criminal defendants and their attorneys are left without evidence going to an officer's credibility, they cannot make the necessary arguments to prosecutors about whether, and to what extent, charges should be filed at all.

That the Directives address an important problem in that regard is obvious. Thus, examples abound of cases in which prosecutors have dropped pending criminal charges because evidence of police misconduct has emerged. These cases include ones in which dismissal may result from a prosecutor's belief that an officer's prior record of misconduct makes his allegations less than credible. *See, e.g.*, Lynda Cohen, *Charges dismissed against man once convicted of assaulting Atlantic City officer*, Breaking AC (Aug. 12, 2019), https://breakingac.com/2019/08/charges-dismissed-against-man-once-convicted-of-assaulting-atlantic-city-officer/ (noting Atlantic County Prosecutor's Office's dismissal of pending charges for assault on police officer because "the officer . . . was the subject of two ongoing Internal Affairs investigations"); Daniel Tepfer, *Bridgeport man's charges dismissed in police misconduct case*, Conn. Post (May 14, 2019), https://www.ctpost.com/local/article/Charges-dismissed-against-

resident-in-cop-13844409.php (describing prosecutor's dismissal of pending charges after internal affairs investigation "found that 17 officers involved in the case violated police rules and regulations including using excessive force on [defendant]").

Dismissal could also result based on allegations police officers acted in an improperly discriminatory matter, such as on the basis of race, which could give rise to a claim of illegal search or a claim of selective prosecution. *See State v. Ball*, 381 N.J. Super. 545, 561 (App. Div. 2005) ("There is no dispute that racial profiling violates due process and equal protection rights when a defendant's car is stopped, and others are not, merely because the driver or passenger is a minority." (internal quotation marks omitted)); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification[.]" (internal quotation marks omitted)). A prosecutor facing this type of allegation could choose to dismiss a case instead of proceeding in the face of serious questions about the legality of the police conduct. Indeed, the New Jersey Attorney General took exactly this action in 2002, with respect to allegations regarding racial profiling in motor vehicle stops on state highways. After being ordered to provide discovery regarding motor vehicle stops and other information to African-American and Hispanic-American defendants, the Attorney General opted to dismiss its prosecutions "in the interests of justice." *State v. Herrerra*, 211 N.J. 308, 327-28

(2012). All told, the State dismissed "more than 150" cases due to racial profiling. *See* Richard Lezin Jones, *New Jersey Prosecutors Cite Racial Profiling in Dismissal of 86 Criminal Cases*, N.Y. Times (Apr. 20, 2002), https://nyti.ms/2C2Rv3L.

In any event, and perhaps more fundamentally, allegations of police misconduct could suggest that the underlying charges were intentionally fabricated by officers. For example, Camden's infamous "fourth platoon" in the late 2000s engaged in a course of conduct that resulted in federal prosecutions of officers for violating citizens' civil rights. *United States v. Figueroa*, 729 F.3d 267, 270-71 (3d Cir. 2013) (describing instances of misconduct that resulted in three police officers pleading guilty and a fourth officer being convicted at trial). Several police officers "admitted to filing false reports, planting drugs, and lying under oath in front of grand juries, at suppression hearings, and at trials." *Forrest*, 930 F.3d at 100; *see also id.* at 100 (noting that in one case officer "admitted that he did not observe a hand-to-hand drug transaction, but falsely included that in the report he had prepared"); *Figueroa*, 729 F.3d at 271 (describing specific allegations of misconduct, including illegal searches, lying about finding contraband in plain view, and planting drugs on arrestees). In those cases, the Camden County Prosecutor dismissed charges, or forfeited pending indictments. *Forrest*, 930 F.3d at 100. But, of course, indictments like those might never have been sought or returned if the prosecutor learned, for example, that these same officers had engaged in similar misconduct in the past – something

that defense counsel would certainly have brought to their attention if they received the information that the Directives will now require. The current system keeps both prosecutor and defense counsel in the dark; neither should be, as the Directives appropriately recognize.

2. Pre-Trial Detention.

Officer credibility can also affect a court's decision whether to release a criminal defendant pending trial. In a pre-trial detention hearing, the court must consider "[t]he weight of the evidence against the eligible defendant[.]" N.J.S.A. 2A:162-20. As the New Jersey Supreme Court has recognized, impeachment evidence could reasonably persuade a court not to detain a defendant, even one who is subject to a presumption of detention. *See Hyppolite*, 236 N.J. at 173-74 (where impeachment evidence was not disclosed prior to a detention hearing, remanding for a new detention hearing due to the "reasonable *possibility* that the result would have been different" (emphasis in original)). And that is, of course, as true for police as it is of any other witness, particularly because the State prosecutors "ordinarily" "proceed by proffer to establish probable cause at detention hearings," *State v. Pinkston*, 233 N.J. 495, 509 (2018), and impeachment evidence that undermines an arresting officer's account could bolster defense counsel's argument that the court should not afford substantial weight to the police officer's account. *See Hyppolite*, 236 N.J. at 167-68 ("[D]efense counsel cannot always fully exercise options available under the CJRA

without first reviewing exculpatory evidence." (citation omitted)); *State v. Ingram*, 230 N.J. 190, 213-14 (2017) (noting that trial court has discretion to require live witness testimony from police officers where State's proffer is insufficient).

3. Pre-Trial Motions

Credibility of police officers can also affect a court's decision on pre-trial motions. For example, courts must often evaluate a police officer's credibility at a hearing on a motion to suppress evidence. *See, e.g.*, *State v. Kennedy*, 134 N.J. Super. 454, 458 (App. Div. 1975). Thus, for example, a court that doubts an officer's credibility could determine that a person did not consent to a search. *See State v. Davila*, 203 N.J. 97, 110-11 (2010) (describing trial court's finding of officer's credibility that occupant consented to search of apartment). Indeed, the misconduct by the Camden "fourth platoon" officers mentioned above included illegal searches, such as lying about finding contraband in plain view. *Figueroa*, 729 F.3d at 271. Those officers also provided false information at suppression hearings, *Forrest*, 930 F.3d at 100, consistent with the well-known practice of "testilying," which includes "false statements by the police . . . intended to hide illegal searches and seizures." Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), https://nyti.ms/2C7x59S.

Other pre-trial motions also take into account considerations of police misconduct. For example, New Jersey's history of traffic stops based on racial profiling implicated both the validity of

the traffic stops, and thus any arrests at issue, as well as the constitutional right against selective prosecution based on race. *See State v. Ballard*, 331 N.J. Super. 529, 539-40 (App. Div. 2000) (citing *Armstrong*, 517 U.S. at 465). In 1996, a Gloucester County Superior Court judge found that statistical evidence had "proven at least a *de facto* policy on the part of the State Police out of the Moorestown Station of targeting blacks for investigation and arrest" in traffic stops. *State v. Soto*, 324 N.J. Super. 66, 84 (Law Div. 1996). That finding resulted in a 1999 Attorney General report, which "concluded that 'minority motorists have been treated differently' in traffic stops on the [New Jersey] Turnpike." *Herrerra*, 211 N.J. at 325 (quoting Att'y Gen. N.J., *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* 4 (1999)). Subsequently, the judge assigned to oversee cases regarding claims of racial profiling ordered the Attorney General to provide discovery regarding motor vehicle stops and other information to African-American and Hispanic-American defendants, because the information disclosed could be "use at a suppression hearing or pretrial motion on selective enforcement, at which time defendants could challenge the legality of a stop or raise a claim of selective prosecution." *Id.* at 327.[5]

[5] As noted *supra* at 22-23, the Attorney General opted to dismiss these cases in the interests of justice, rather than litigating the underlying claims. *See Herrerra*, 211 N.J. at 327-28.

Certainly, discovery of police misconduct evidence can affect a judge's adjudication of pre-trial criminal motions. The Directives, by promoting disclosure of such evidence, will assist the courts in deciding such applications.

4. Trial.

Officer misconduct is also, of course, relevant evidence for cross-examination of a police officer witness at trial. *See, e.g.*, *United States v. Whitmore*, 359 F.3d 609, 619-20 (D.C. Cir. 2004) (holding that district court improperly denied cross-examination based on officer's prior false statements under oath and other misconduct because such evidence "was strongly probative of [the officer's] character for untruthfulness"). Courts have specifically highlighted how police officer witnesses can be effectively cross-examined based on their disciplinary records. For example, in *Dorsey v. State*, 582 S.E.2d 158 (Ga. App. 2003), the court noted that defense counsel used an internal affairs report "to conduct an extensive and effective cross-examination of" the police officer witness, and obtained an acquittal on the most serious charge against the defendant. *Id.* at 183;[6] *see also United States v. Davis*, 183 F.3d 231, 256-57 (3d Cir. 1999) (approving cross-examination of defendant police officer's prior acts of police misconduct, including false entries in police logs and lying to internal affairs, because those instances "went to

[6] In Georgia, unlike in New Jersey, internal affairs records are publicly available following the disposition of the complaint. *See* Ga. Code § 50-18-72(a)(8).

[the officer's] untruthfulness"). Indeed, such a cross-examination can be so overwhelming as to make an adjudication of guilt become against the weight of the evidence. *See, e.g.*, *In re Shamik M.*, 986 N.Y.S.2d 566, 1057 (N.Y. App. Div. 2014) (reversing juvenile delinquency adjudication where police officer testimony was impeached by prior findings of misconduct and internal affairs complaint history). The discovery promoted by the Directives will enhance the ability of criminal defense lawyers to conduct appropriate cross-examination and persuade a jury (or a judge, in a bench trial) that the State cannot prove its case beyond a reasonable doubt.

Indeed, recent changes to Rule 608 of New Jersey Rule of Evidence, which just became effective on July 1, confirm the relevance and admissibility of evidence of prior misconduct. Before these amendments, Rule 608 permitted inquiry into specific instances of misconduct that bore on a witness's credibility only if they involved a "false accusation against any person of a crime similar to the crime with which defendant is charged." *Scott*, 229 N.J. at 481 (quoting *N.J.R.E.* 608). That could have applied to police officer witnesses who had previously made false accusations against citizens, had the pertinent information been known to the defense. But, in any event, the rule now states that a court may "permit inquiry into specific instances of conduct that are probative of the character for truthfulness or untruthfulness of . . . the witness." *N.J.R.E.* 608(c). Thus, defense attorneys not only may but now really must seek discovery in order to cross-

examine police officer witness about other instances of misconduct that bear on their credibility, such as falsifying records or lying to internal affairs. *Cf. Hernandez*, 225 N.J. at 466 (rejecting discovery of information about cooperating witness only because, under former *N.J.R.E.* 608, previous "false and inconsistent statements . . . would not be admissible"). The Directives are a first step in making that effort possible.

The significance of such an inquiry is confirmed by evidence showing how common it is for police officers to commit repeated acts of misconduct. Indeed, systematic evidence of repeated officer misconduct is illustrated by a recent study published in the Yale Law Journal. *See* Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 Yale L.J. 1676 (2020). The phenomenon of the "wandering officer" involves "police officers who are fired or who resign under threat of termination and later find work in law enforcement elsewhere." *Id.* at 1682. The study's authors, using data available for Florida law enforcement personnel, find that these wandering officers are more likely to receive complaints for additional, subsequent misconduct, including "integrity-related misconduct" such as "false statements, perjury, misuse of public position, and fraud." *Id.* at 1743-44 (internal quotation marks omitted). In other words, prior misconduct predicts future misconduct in ways that could bear on a police officer witness's credibility, or could otherwise be used to disprove the veracity of the charges brought based upon his version of events. Indeed, recent news reports have suggested that New Jersey has its own

"wandering officer" problem. *See* Rukmini Callimachi, *9 Departments and Multiple Infractions for One New Jersey Police Officer*, N.Y. Times (June 24, 2020), https://nyti.ms/3gyivYf (describing how officer with multiple allegations of misconduct was nonetheless hired at nine different New Jersey police departments).

In sum, an officer's history of misconduct is relevant, admissible evidence at trial. And indeed, it can be crucial evidence, particularly in the many cases that boil down to the credibility of a police officer compared to that of the criminal defendant. *See Robinson*, 730 A.2d at 196; *B.M.*, 66 So.3d at 1015. By promoting discovery of this evidence, the Directives serve to enhance the fairness and truth-seeking function of the criminal justice system. That alone undermines any notion that the Directives are arbitrary and capricious. *See State v. Press*, 278 N.J. Super. 589, 597-98 (App. Div. 1995) (concluding that because "the criminal justice system rests on the principle of fair treatment for everyone," prosecutorial guidelines regarding waiver of mandatory minimums were not arbitrary or capricious).

5. Post-Conviction Relief.

Finally, disclosure of names of officers involved in misconduct may assist defendants in petitions for post-conviction relief. *See, e.g.*, *El-Laisy*, 2019 WL 3183647, at *2-5 (reversing conviction where prosecution did not disclose existence of open internal affairs investigations, where officer testified at trial that he had been "cleared" on all such investigations). In

particular, the Directives' requirement of retroactive disclosure of the names of officers who have previously been subjected to major discipline will facilitate discovery of new evidence that could result in successful post-conviction petitions. *See, e.g.*, *Knight*, 145 N.J. at 247-48 (reversing convictions under *Brady* and its progeny due to failure to disclose impeachment evidence); *State v. Nelson*, 330 N.J. Super. 206, 215 (App. Div. 2000) (same); *State v. Henries*, 306 N.J. Super. 512, 535-36 (App. Div. 1997) (same). Certainly, evidence that a particular police officer was found to have been engaged in the kind of serious misconduct that is at issue in the Directives will appropriately cause competent defense counsel to investigate whether misconduct might have been committed in their clients' cases as well. Indeed, it is for that reason that, in other jurisdictions not laboring under the restrictions that have characterized New Jersey law, courts have reversed convictions because prosecutors failed to disclose material, powerful impeachment evidence contained in internal affairs files. *See, e.g.*, *Milke v. Ryan*, 711 F.3d 998, 1012-13 (9th Cir. 2013) (identifying, among other undisclosed impeachment evidence, an internal affairs report stating, of police officer witness, that "[y]our image of honesty, competency, and overall reliability must be questioned"); *State v. Laurie*, 653 A.2d 549, 552 (N.H. 1995) (reversing conviction based on undisclosed impeachment evidence in police officer witness's personnel file, which revealed "numerous instances of conduct that reflect negatively on [the officer's] character and credibility").

And even without a court decision vacating a criminal conviction, post-conviction discovery of police misconduct may lead the State to voluntarily grant post-conviction relief. Thus, in connection with the Camden police "fourth platoon" misconduct described above, some of the resulting cases ended in dismissals of convictions against even defendants who had previously pled guilty. *See Forrest*, 930 F.3d at 100 (noting guilty plea that was later vacated and charges dismissed); *Mills v. State, Dep't of Treasury*, 435 N.J. Super. 69, 73 (App. Div. 2014) (describing four people who pled guilty based on charges involving convicted officers). All told, the officers' misconduct "resulted in judgments vacated, charges dismissed, or pending indictments forfeited in over 200 criminal cases." *Forrest*, 930 F.3d at 100.

Examples abound from other jurisdictions as well. In Chicago, for example, Sergeant Ronald Watts spearheaded a decades-long effort to extort and frame innocent people at a public housing complex, which has resulted in the reversal of almost 100 criminal convictions. Grace Hauck, *Prosecutors have thrown out nearly 100 convictions tied to 'rogue' Chicago cop*, USA Today (Feb. 11, 2020), https://bit.ly/3eUI2Kp. Watts and others who worked with him planted drugs and otherwise made false allegations against those who would not participate in the extortion scheme. *See, e.g.*, *People v. Glenn*, 106 N.E.3d 462, 463-64 (Ill. App. 2018) (describing exoneration of falsely convicted defendants). In another example, from Contra Costa County, California, prosecutors dismissed fifteen convictions linked to two officers who were found

to have systematically falsified crime reports. *See 15 Criminal Cases Dismissed Over Alleged Pittsburg Police Misconduct*, CBS San Francisco (Dec. 15, 2016), https://sanfrancisco.cbslocal.com/2016/12/15/15-criminal-cases-dismissed-over-alleged-pittsburg-police-misconduct/.

These example are, of course, only the tip of the iceberg of cases dismissed after post-conviction allegations of police misconduct have surfaced and resulted in exoneration of convicted defendants. The Attorney General's Directives promote the discovery of additional examples of such cases, in furtherance of the fair administration of criminal justice and the just disposition of cases which thus far may have been infected by secret police misconduct.

II. APPELLANT'S REQUEST FOR A STAY SHOULD BE DENIED BECAUSE THEY ARE UNLIKELY TO SUCCEED ON THE MERITS AND EQUITABLE FACTORS COUNSEL AGAINST A STAY.

Because Appellant seeks a stay of implementation of the Directives, they have the "burden to prove . . . by clear and convincing evidence" each of the following factors: "(1) relief is needed to prevent irreparable harm; (2) [Appellant's] claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." *Garden State Equality v. Dow*, 216 N.J. 314, 320 (2013) (internal quotation marks omitted); *see also Crowe v. De Gioia*, 90 N.J. 126, 132-34 (1982) (setting forth same factors). As is further described below, Appellant cannot meet its burden

here because the Directives are not subject to an indisputable legal challenge, and other equitable considerations favor immediate implementation of the Directives and their implications for disclosure of police misconduct in criminal cases.

A. Appellant Is Not Likely to Succeed on the Merits Because the Directives, by Reasonably Permitting Discovery of Police Misconduct, Are Not Arbitrary and Capricious.

In order to demonstrate a likelihood of success on the merits warranting a stay pending appeal, Appellant must show that its "underlying legal claim is settled." *Garden State Equality*, 216 N.J. at 325. But in this case, while the legal standard applicable to Appellant's claims is not controversial, the deferential nature of the standard that governs the Court's inquiry undercuts any of Appellant's efforts to meet its burden.

Indeed, it is well-settled that "[o]rdinarily, an appellate court will reverse the decision of an administrative agency only if it is arbitrary, capricious or unreasonable, or it is not supported by substantial credible evidence in the record as a whole." *Wisniewksi v. Murphy*, 454 N.J. Super. 508, 526 (App. Div. 2018) (citing *Mazza v. Bd. of Trs.*, 143 N.J. 22, 25 (1995)). The discretion given to administrative agencies means that "an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." *Ibid.* (quoting *In re Virtua-W. Jersey Hosp. Voorhees for Certificate of Need*, 194 N.J. 413, 422-23 (2008)).

Here, the Attorney General, who is the State's chief law enforcement officer, N.J.S.A. 52:17B-98, has chosen to exercise that authority to provide for public disclosure of officers whose conduct has been subject to major disciplinary action. The Attorney General's action is reasoned, and is far from arbitrary and capricious, for, among other reasons discussed by the State and other *amici*, the positive effects the Directives will have on the administration of criminal justice, as described in this *amici* brief. The effectiveness and integrity of the criminal justice system is one of the responsibilities of the Attorney General, and there can be little question, as set forth herein, that the Directives promote those values.

Specifically, the impact of the Directives in terms of providing discovery to criminal defendants of exculpatory evidence provides part of the "substantial credible evidence" supporting their implementation. *Mazza*, 143 N.J. at 25. At the least, this along with all of the other supporting evidence, combined with the deferential standard of review, demonstrates that Appellant cannot show that it has a "settled" right to relief that would justify a stay. *Garden State Equality*, 216 N.J. at 325.

B. Trial Judges Retain Discretion to Control Disclosure and Use of Police Misconduct Records in Criminal Cases, Thus Avoiding Irreparable Harm.

Appellant argues that it may suffer irreparable harm from the public disclosure of the names of officers who engage in misconduct, essentially assuming that the public will misuse the information. *Amici* note that in many of the cases cited in this

brief, information about officer misconduct was publicly released, not only through published court cases but also through press reports, and no unwarranted harm, let alone irreparable harm, resulted to those officers. Nor, obviously, can valid impeachment based on misconduct, which as discussed benefits the fair administration of criminal justice, engender irreparable harm sufficient to justify a stay. *See In re Comm'r of Ins. Deferring Certain Claim Payments by N.J. Auto. Ins. Underwriting Ass'n*, 256 N.J. Super. 553, 560 (App. Div. 1992) (rejecting stay of administrative action pending appeal because "[t]he irreparable harm suffered by the public, as a whole, far exceeds the potential burden placed upon" movants).

That said, with respect to the criminal discovery promoted by the Directives, courts retain discretion to manage discovery, disclosure, and use of police disciplinary records in a way that will prevent against the kinds of errors that Appellant predicts. Thus, as noted above, discovery of police disciplinary records will be warranted only on the basis of a showing that the material requested in discovery will bear on the issue of the officer's credibility, or on the merits of the case. *Harris*, 316 N.J. Super. at 399. Where appropriate, such records may be subject to *in camera* review prior to disclosure to the defense, thus allowing the court to control the flow of information if necessary. *See id.* at 398; *see also State v. Williams*, 197 N.J. 538, 540-41 (2009) (mem.) (ordering disclosure of personnel file of law enforcement officer, but subject to *in camera* review and redaction of materials).

Thereafter, a judge could reject a request for records, even where there is a publicly known infraction, if the issue does not rise to the level of affecting the officer's credibility or if, as set forth below, it does not satisfy the requirement of Evidence Rule 608(b).[7] And even if the information is ordered to be disclosed, the court can condition production on the entry of an appropriate protective order that can prevent the public dissemination and misuse of the information. *See R.* 3:13-3(e); *State v. Williams*, 403 N.J. Super. 39, 51 (App. Div. 2008), *aff'd as modified*, 197 N.J. 538 (2009).

[7] In particular, Rule 608 states that the court "*may* . . . permit inquiry into specific instances of conduct" in order to examine the witnesses credibility. *N.J.R.E.* 608(c) (emphasis added). The court must also be satisfied, prior to the information being used on cross-examination, that "a reasonable factual basis exists that the specific instance of conduct occurred." *N.J.R.E.* 608(d)(1); *see also N.J.R.E.* 104(a)(1) ("The court shall decide any preliminary question about whether . . . evidence is admissible."). And admissibility of specific acts bearing on credibility is "subject to the balancing standard of [*N.J.R.E.*] 403." *N.J.R.E.* 608(e); *see also State v. Cole*, 229 N.J. 430, 448 (2017) ("*N.J.R.E.* 403 . . . mandates the exclusion of evidence that is otherwise admissible 'if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.'"). Finally, except for evidence of a prior false accusation or a criminal conviction, "extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." *N.J.R.E.* 608(c). In other words, the cross-examiner can ask the police officer witness about facts contained in police disciplinary records, but will be bound by the witness's answer to the question. *See, e.g.*, *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996).

In sum, with regard to the discovery at issue here, to the extent that they arise in a criminal case, trial judges can, through careful rulings, balance the various interests at stake to ensure that evidence of police misconduct is disclosed and used appropriately and fairly in furtherance of the ultimate goal of the criminal justice system: to arrive at the truth about a defendant's guilt. The irreparable harm that Appellant fears will not, in this context, be realized in any regard.

C. Failing to Promptly Disclosure of Police Misconduct Would Work An Inappropriate Hardship on the Criminal Justice System.

Finally, "in weighing the relative hardships to the parties," *Garden State Equality*, 216 N.J. at 320, the Court should consider the broad impact that the Directives will have on the criminal justice system. As the Supreme Court has recognized, "a fair and just criminal trial is not just the concern of the judiciary responsible for the administration of justice in the courts; it is a shared concern of both the defendant involved and the State[.]" *Scoles*, 214 N.J. at 251-52.

Indeed, by promoting the discovery of relevant evidence of police misconduct, the Directives allow prosecutors to effectively carry out the special responsibilities imposed on them to conform to "their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *State v. Jackson*, 211 N.J. 394, 408 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 451 (2009)). As outlined in the many examples cited above, discovery of police misconduct facilitates prosecutorial dismissal of cases, either

pre-trial or post-conviction, in which the lack of officer credibility makes the charges unsustainable. *See Forrest*, 930 F.3d at 100 (noting that Camden "fourth platoon" misconduct investigation "resulted in judgments vacated, charges dismissed, or pending indictments forfeited in over 200 criminal cases"). In that vein, the Directive promotes at least three of a prosecutor's ethical obligations under the Rules of Professional Conduct: first, to refrain from "offering evidence that the lawyer knows to be false," and to "take appropriate remedial measures" upon learning of the falsity of material evidence, *RPC* 3.3(a)(4); second, to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause," *RPC* 3.8(a); and third, to "make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense," *RPC* 3.8(d). Fulfilling these responsibilities is, of course, very much in the interests of the public, which wants no more than a fair and accurate system of criminal justice.

Indeed, as described above, the Directives will promote a just, fair criminal justice system that carefully examines police officer credibility in furtherance of the truth, as well as the vindication of criminal defendants' constitutional rights. *See Scott*, 229 N.J. at 492-93 (Rabner, C.J., concurring) (cross-examination based on prior misconduct "serves one of the core principles of the justice system: to seek the truth by confronting and possibly exposing a witness who may lack credibility"). More

particularly, a stay of the Directives would work ongoing, continuous harm on the criminal justice system. As described above, evidence of police officer misconduct is sadly common – now more than ever. And the consequences to a defendant of depriving them of this critical information will have an immediate and constant effect on the fate of criminal defendants, who face the loss of their liberty without the opportunity to muster critical facts which might be used to secure their freedom, whether at a pretrial detention hearing, in motion practice, at trial or thereafter.

Therefore, in weighing the relative hardships of a stay, this Court should weigh the Directives' impact on promoting the "effective, efficient, fair and balanced system of criminal justice" that is in the State's interest. *Hinds*, 90 N.J. at 624. Viewed against that backdrop, a stay of the Directives would work an inappropriate hardship on the vindication of the rights of criminal defendants, as well as prosecutors and judges. Appellant's request for a stay should be denied.

CONCLUSION

The Attorney General has taken a laudable, initial step towards disclosure of material police misconduct that could affect the integrity of all aspects of the criminal justice system. Because the Directives are therefore in the public interest, this Court should reject Appellant's request for a stay and permit the immediate implementation of the Directives.

Respectfully submitted,

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amici Curiae

BY: */s Lawrence S. Lustberg*
Lawrence S. Lustberg, Esq.

BY: */s Michael R. Noveck*
Michael R. Noveck, Esq.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Mohamed B. EL-LAISY, Defendant-Appellant.

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Attorneys and Law Firms

Robert Marc Gamburg (Gamburg and Benedetto), attorney for appellant.

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Dylan P. Thompson, Assistant Prosecutor, on the brief).

Before Judges Koblitz and Mayer.

Opinion

PER CURIAM

***1** Defendant appeals from his October 20, 2017 convictions of third-degree assault against a police officer, N.J.S.A. 2C:12-1(b)(5)(a); two counts of fourth-degree obstructing the administration of law, N.J.S.A. 2C:29-1(a) and(b); and two counts of third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a). He received an aggregate sentence of probation for two years. The jury convicted defendant of assaulting an officer in a September 2011 casino night-club brawl, rejecting his claim that he acted in self-defense after that officer attacked him.

After the verdict, defense counsel learned the State had not disclosed that the officer remained the subject of two ongoing investigations by the police department's Internal Affairs Unit (IA) for excessive force, including the incident involving defendant. The State also did not reveal that the Federal Bureau of Investigation (FBI) had initiated an investigation into the officer, or that the officer had asserted his right to remain silent over 1400 times when questioned in a federal civil suit brought by another citizen, D.C. [1] Defendant argues that these non-disclosures, as well as the officer's false statement that IA had "cleared" him of all allegations, violated Brady v. Maryland, 373 U.S. 83 (1963). We agree that the failure to disclose the ongoing investigations into the officer's conduct and his testimony in the civil suit violated Brady and reverse. We reject defendant's further argument that he was denied a speedy trial.

After his December 2011 indictment, and a subsequent May 2013 superseding indictment, [2] which charged him with assaulting two officers, defendant moved for production of Atlantic City Police Department (ACPD) IA materials. After in camera review, the motion court [3] allowed defendant to cross-examine the officer about twenty-two IA investigations into the officer's conduct. The motion court found that eight of the complaints involved suspects charged with conduct similar to the charges against defendant. It also found that in the officer's report of those eight incidents he quoted the suspects as using near identical language to statements he claimed defendant made. The motion court also allowed defendant to cross-examine the officer regarding these eight incidents.

The court held, "as a matter of reciprocal fairness, the fact that [the officer] was effectively 'cleared' in all [twenty-two] excessive force complaints by the ACPD may be addressed by either (or both) parties in the course of cross or redirect examination (or both)."

At trial, both officers and casino security personnel testified, describing their initial encounter and subsequent struggle with defendant, and defendant hurling verbal abuse. Defendant also testified, asserting he acted in self-defense. Both sides played portions of surveillance footage from the casino club. Because the footage was grainy and not consistently clear, counsel asked the witnesses to explain the action and point out their presence at different times. While the video showed defendant resisting and struggling with the officers, it did not capture the first moments of the altercation; thus, it could not definitively show who instigated the fight. The jury convicted defendant of all charges relating to the officer who had received citizen complaints, but acquitted defendant of assaulting the other officer.

***2** Defendant raises the following issues on appeal:

POINT I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON VIOLATIONS OF BRADY, GIGLIO[4] AND AFTER DISCOVERED EVIDENCE.

POINT II: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SPEEDY TRIAL MOTION AND ALLOWING OVER FIVE YEARS TO ELAPSE FORM THE DATE OF OFFENSE UNTIL TRIAL.

A. LENGTH OF DELAY.

B. REASON FOR DELAY.

C. ASSERTION OF RIGHT.

D. PREJUDICE TO DEFENDANT.

I. Brady Violation.

After the verdict but before sentencing, defense counsel received IA investigation documents from another attorney. The materials included an April 2016 affidavit by ACPD Chief Henry White, in connection with a federal civil suit against the officer and the ACPD by D.C. White certified that IA began an investigation into the officer relating to D.C.'s allegation of excessive force, but suspended the investigation:

> 3. After assigning the matter with an [IA] Case Number, the Atlantic County Prosecutor's Office [ACPO] was notified of the [IA] Complaint, and the [ACPO] took possession of the investigation prior to any substantive investigative work being performed, other than document review, by the Atlantic City [IA].
>
> 4. The [ACPO] has completed their investigation and the Atlantic City [IA] is currently in possession of the [IA] file; however, no investigation has commenced on the part of the [ACPD] or the Atlantic City [IA].
>
> 5. The Atlantic City [IA] has elected not to follow up with an internal affairs investigation into the matter based upon the fact the we have reason to believe that the matter is currently under investigation by the [FBI], and as such, we will not begin the internal affairs investigation unless and until we receive written confirmation from the [FBI] that their investigation has concluded; and, upon advice and the recommendation of the New Jersey State Association of Chiefs of Police, ... the Atlantic City [IA] has been hesitant to pursue an internal affairs investigation into any matters that are associated with pending civil litigation.

Because defendant, like D.C., sued the officer for excessive force, defendant reasoned the IA investigation relating to his complaint against the officer was also suspended pending the civil litigation

Defendant also received a copy of ACPD Captain Jerry Barnhart's certification, also for D.C.'s civil suit, stating that IA had not concluded its investigation into either D.C.'s or defendant's excessive-force complaint. Barnhart affirmed that defendant's complaint

> remains as an open IA case and Sgt. Johnson has indicated he will prioritize the matter along with two other internal affairs matters he has been required to prioritize and, as such, is working several cases including [El-Laisy's] simultaneously and moving them along as expeditiously as he is able.

Barnhart noted that defendant "remains pending criminal trial which has been postponed several times with trial presently scheduled, to my understanding, this month (September 2016)." He certified: "Police Chief Henry White suspended the [D.C.] investigation because of pending litigation. This decision was based on a recommendation from the State Chiefs' Association."

***3** Defendant also received the officer's December 2015 deposition for D.C.'s federal civil suit, in which the officer answered virtually every question by asserting his Fifth Amendment right to remain silent. According to defendant, during the 253-page deposition, the officer invoked the Fifth Amendment more than 1400 times.

Defendant moved for a new trial, claiming the State violated his right to exculpatory evidence by not disclosing these materials and that the documents constituted after-discovered evidence requiring a new trial.[5] The trial court denied defendant's post-trial motion. Mistakenly analyzing the situation under the Rule 3:20-1 test for vacating a verdict that is against the weight of the evidence, the court concluded that, after giving "due regard to the opportunity of the jury

to pass upon the credibility of the witnesses," defendant could not "clearly and convincingly" demonstrate "a manifest denial of justice."

On appeal, defendant renews his argument that the State violated Brady by not disclosing that the IA investigations relating to both defendant and D.C. remained ongoing; that the officer was the subject of an FBI investigation; and that the officer had asserted the Fifth Amendment numerous times, including in reference to defendant's incident. Defendant also argues that the State improperly allowed the officer to testify he had been "effectively cleared" in all twenty-two cases.

Whether non-disclosure of evidence violates Brady is a mixed question of law and fact, where the trial court's decision concerning the materiality of the evidence merits deference. State v. Marshall, 148 N.J. 89, 185-86 (1997). We do not defer, however, where the trial court did not analyze the claim under the correct legal standard. Id. at 185. Relying in great part on the motion court's pre-trial decision, the trial court mistakenly treated defendant's motion as a claim that the verdict was against the weight of the evidence, requiring deference to the credibility determinations of the jury and clear and convincing evidence of a manifest denial of justice. See R. 3:20-1. To be successful in a Brady claim, however, the defendant must show: (1) the State suppressed evidence (2) that was favorable to the defendant and (3) material to the verdict. State v. Nelson, 155 N.J. 487, 497 (1998). Even an inadvertent failure to disclose evidence may violate Brady. State v. Brown, 236 N.J. 497, 519 (2019).

The State is deemed to have suppressed evidence when it had either actual or imputed knowledge of the materials. Nelson, 155 N.J. at 498. Knowledge is attributed to the trial prosecutor when the evidence is in the possession of "the prosecutor's entire office ..., as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." Id. at 499 (quoting Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 824 (10th Cir. 1995)) (alteration in original).

Chief White's and Captain Barnhart's statements, which they made a few months before defendant's trial, demonstrate that the ACPD knew the IA investigations into both defendant's and D.C.'s complaints remained ongoing. Chief White's deposition testimony revealed the police knew that the officer had exercised his right against self-incrimination, and that the FBI had initiated an investigation into the officer. Because ACPD leadership knew of this undisclosed information, their knowledge is imputed to the prosecutor. Therefore, defendant has met the first Brady prong.

***4** The undisclosed evidence is favorable to defendant, as required by the second Brady prong, because it undermines the officer's credibility and raises doubt as to whether defendant was the initial aggressor. That IA investigations into defendant's and D.C.'s incidents remained open would have contradicted the officer's assertion, sanctioned by the motion court, that he had been cleared of all twenty-two complaints. Additionally, knowledge of an FBI investigation into the officer's conduct may have undercut his credibility with the jury.

As for the third, materiality prong, the applicable standard depends on the undisclosed evidence. State v. Carter, 91 N.J. 86, 112 (1982). Where the prosecution knowingly presented perjured testimony, "any reasonable likelihood that the false testimony could have affected the judgment of the jury" will warrant reversal. Ibid. (quoting United States v. Agurs, 427 U.S. 97, 103-04 (1976)). This heightened standard stems from the principle that the State may not obtain a conviction through falsified or tainted evidence or testimony. See State v. Gookins, 135 N.J. 42, 49-51 (1994).

Where the violation consisted of a failure to disclose favorable evidence (whether specifically requested or not), the court must reverse if the non-disclosure precluded "a verdict worthy of confidence." Brown, 236 N.J. at 520 (quoting Nelson, 155 N.J. at 500); Marshall, 148 N.J. at 156. Under this standard, "evidence is material if there is a 'reasonable probability' that timely production of the withheld evidence would have led to a different result at trial." Brown, 236 N.J. at 520 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." Nelson, 155 N.J. at 500 (quoting Bagley, 473 U.S. at 682).

Materiality turns on "the importance of the [evidence] and the strength of the State's case against [the] defendant as a whole." Marshall, 123 N.J. at 200. The significance depends on "the context of the entire record." Brown, 236 N.J. at 518-19 (quoting Marshall, 123 N.J. at 199-200). The context includes "the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Id. at 519.

The State presented false testimony and failed to disclose pertinent impeachment evidence. With the motion court's permission, the officer responded "yes" to defense counsel's question if IA had "cleared" him in all twenty-two cases. Chief White's affidavit and Captain Barnhart's certification demonstrate that, in fact, both D.C. and defendant's investigations remained ongoing. Thus, the officer's statement that he had been "cleared" of all twenty-two allegations was not accurate. We must reverse if it is reasonably likely that the false testimony could have affected the jury's judgment. Carter, 91 N.J. at 112.

The officer, as the prime actor and claimed victim in this incident, was the State's most significant witness. Evidence of pending charges against or an ongoing investigation into a witness is admissible "to show that the State may have a 'hold' of some kind over [the] witness." State v. Parsons, 341 N.J. Super. 448, 458-59 (App. Div. 2001) (holding an ongoing criminal investigation into an officer's misconduct was material under Brady to the defendant's decision to enter a guilty plea). The inconclusiveness of the surveillance footage, together with the officer's history of complaints of excessive force, weakened the State's case, requiring it to persuade the jury of the officer's credibility and character. Whether he remained the focus of investigations for violence—especially against defendant himself—went to the heart of the trial and had the capacity to influence the jury's verdict.

***5** The officer's assertion of his Fifth Amendment privilege numerous times, and the continuing FBI investigation, if known prior to trial, could also have produced a different verdict, considering the significance and admissibility of the information. See Brown, 236 N.J. at 520. New Jersey case law has recognized a constitutional requirement to disclose any information that may reasonably lead to additional evidence discrediting the State's witnesses or contradicting its narrative. See State v. Williams, 403 N.J. Super. 39, 46-47 (App. Div. 2008) (concluding that the State must disclose inadmissible evidence that could lead to related admissible evidence). Here, evidence of a federal investigation into the officer would have been admissible to impeach the officer. The nondisclosure of the officer's many invocations of his right to remain silent, the continuing investigations, and his inaccurate representation that he was instead "cleared" of all allegations requires reversal in these circumstances, where the verdict rested in large part on the credibility of the officer.

II. Speedy Trial.

Defendant also argues for reversal of his conviction due to violation of his right to a speedy trial. A defendant's right to a speedy trial under the United States and New Jersey constitutions, though fundamental, is "necessarily relative." Barker v. Wingo, 407 U.S. 514, 522 (1972) (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)); State v. Cahill, 213 N.J. 253, 268 (2013). Whether the State violated this right turns primarily on four factors: (a) the length of delay; (b) reason for the delay; (c) the defendant's assertion of the right; and (d) the resultant prejudice to the defendant. Cahill, 213 N.J. at 264 (citing Barker, 407 U.S. at 530). A court must balance all the factors in assessing whether the right was violated. Ibid. Some delays, such as those exceeding one year, are "presumptively prejudicial" and trigger the court's consideration of the remaining factors. Ibid. (quoting Barker, 407 U.S. at 530).

Not all reasons for a delay weigh equally against the State. For example, while a deliberate delay to hamstring the defense will weigh heavily in favor of finding a violation, mere negligence by the State or an outsized caseload will weigh less heavily—although the State remains ultimately responsible to move cases along in a timely manner. Id. at 266. While a defendant has no duty to assert his right to a speedy trial, asserting the right "in the face of continuing delays is a factor entitled to strong weight when determining whether the state has violated the right." Ibid. The prejudice that a defendant suffers from a delayed trial may include the psychological stress of a pending charge, possible "impairment of the defense" (such as due to a witness's absence or inability to recall), or "oppressive incarceration." Id. at 266.

Defendant's trial began September 21, 2016, three years and four months after the May 28, 2013 superseding indictment, and five years, eight days after the brawl. Because the delay ran longer than one year, it triggers consideration of the other factors. After careful review of the record, we are satisfied that the delay stemmed from numerous factors, frequently caused by defendant, his co-defendant or their counsel. The complicated legal and factual issues and numerous motions also created a lengthy process.

Defendant moved for dismissal claiming violation of his right to a speedy trial for the first time in February 2016, about six months before trial began. His delay in asserting the right suggests the deprivation was not serious, although he claims,

without documentation, that an important defense witness moved out of the country.

Together, the Barker factors do not support defendant's claim of a violation of his right to a speedy trial. Both the defense and the State had a part in causing the delay, and the State-caused postponements stemmed from neutral factors, not bad faith. Defendant cannot demonstrate any substantial prejudice the delay occasioned him. He was not incarcerated pending trial. We therefore do not reverse based on speedy trial grounds.

***6** Because defendant did not receive important information from the State concerning investigations still pending against a crucial State witness, however, we are constrained to reverse.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2019 WL 3183647

Footnotes

1 We use initials to protect his privacy.
2 He was indicted with a co-defendant who is not involved in this appeal.
3 The judge who heard the pre-trial motion did not try the case.
4 Giglio v. United States, 405 U.S. 150 (1972).
5 On appeal, defendant does not brief his argument concerning after-discovered evidence so we deem that issue abandoned. Morris v. T.D. Bank, 454 N.J. Super. 203, 206 n.2 (App. Div. 2018).

2017 WL 1737906
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Kwadir FELTON, Defendant–Appellant.

DOCKET NO. A–0062–14T3
|
Argued March 2, 2017
|
Decided May 4, 2017

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11–05–0043.

Attorneys and Law Firms

David A. Gies, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Gies, on the briefs).

Emily R. Anderson, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Anderson, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges Lihotz, Hoffman and Whipple.

Opinion

PER CURIAM

***1** Defendant Kwadir Felton appeals from a May 29, 2014 judgment of conviction after a jury trial. We affirm defendant's conviction and defendant's sentence except we discern the trial judge failed to explain the basis for the consecutive sentences imposed on counts thirty-three and thirty-five, requiring we vacate these sentences and remand for resentencing. Finally, we require the judgment of conviction be corrected to properly recite the statute under which defendant was convicted on count thirty-three.

On May 19, 2011, defendant was indicted for second-degree conspiracy to launder money and sell PCP, heroin, and marijuana, *N.J.S.A.* 2C:5–2; second-degree possession of a weapon for an unlawful purpose during a drug distribution conspiracy, *N.J.S.A.* 2C:2–6 and *N.J.S.A.* 2C:39–4(a)(2); second-degree unlawful possession of a weapon, as a principal or an accomplice, *N.J.S.A.* 2C:2–6 and *N.J.S.A.* 2C:39–5(b); second-degree possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a)(1); and fourth-degree aggravated assault, *N.J.S.A.* 2C:12–1(b)(4). On November 14, 2013, after hearing the following summarized testimony, the jury returned a guilty verdict on all counts.

In July 2009, the Jersey City Police Department (JCPD) and New Jersey State Police (NJSP) initiated an undercover investigation of a narcotics distribution network involving Dempsey Collins, David Gilliens, Rasheed Boney, and others in Jersey City. JCPD Detective Rebecca Velez and Sgt. Thomas McVicar were assigned to the investigation. Velez, the lead detective, was engaged in undercover narcotic buys, while McVicar was supervisor of the surveillance team. Beginning in December 2009, a surveillance team began monitoring phone lines registered to Gilliens and Collins. Police heard the name "Kwa" mentioned in phone calls and heard someone identified as Kwa speak during some calls. On one call, Kwa discussed his inventory of drugs with Collins. On another, Collins told Gilliens Kwa was outside selling drugs. Kwa informed Gilliens on another call how much heroin he had. It was not until January 10, 2010, the police identified Kwa as defendant.

On January 10, 2010, McVicar learned a suspected drug sale was about to occur in the area of the ring's "headquarters" that would involve Collins' red Acura TL. McVicar parked his truck across the street from an unoccupied red Acura. McVicar had a JCPD radio, a NJSP radio, his personal cell phone, and a department-issued Nextel push-to-talk "chirp" phone. From where McVicar was parked, he could see the Acura through his windshield. The windshield and front side windows of McVicar's truck were not tinted, but the rear windows had a tint.

McVicar locked the doors of his truck, placed the keys in the center console, and climbed into the backseat of his truck and sat "longways" across the bench seat. He rested his head against the rear side window behind the driver's seat. McVicar was wearing his police badge around his neck and he had his .45 caliber handgun in the holster.

***2** McVicar testified he observed a black SUV pull up alongside the red Acura. Collins exited the SUV and

proceeded to go back and forth between the Acura and the SUV, until the SUV drove away. After a few minutes, Collins drove away in the red Acura with Gilliens. While McVicar waited to see if the Acura returned, he sensed someone was behind him. When he turned slightly to look out the window, he noticed defendant leaning against the driver's side window of the truck looking in to the truck crossways. McVicar testified he "tried to get a hold of the State police radio" but "was a little freaked out" because he had not heard or seen anyone approach his truck. His police radio fell to the floor of the truck, startling defendant. McVicar testified defendant then looked fully into the rear window, bent down from his view, and McVicar "heard the racking of the slide of a ... pistol."

According to McVicar, defendant "stood back up and reappeared" in the driver side window with the gun held up against his chest and started looking in to the windows. McVicar took his gun out of his holster and testified defendant looked straight through the driver side window and pointed the firearm into the interior of the car towards him. Fearing for his life, McVicar aimed his gun at defendant and fired one shot striking defendant's head. McVicar exited his truck from the passenger side door and found defendant lying on the ground with a gunshot wound to his head. A .9 millimeter handgun was lying next to him. McVicar radioed dispatch for an ambulance.

JCPD Sergeant Joseph Sarao arrived within seconds of McVicar's call. Sarao testified when he arrived, defendant was lying on the ground near the front of McVicar's truck bleeding from a gunshot wound to his temple. Sarao observed broken glass on the ground, McVicar's truck window was shattered, and there was a gun on the ground near defendant's head. Jersey City Emergency Medical Services transported defendant to the hospital.

Following the shooting, numerous phone calls were intercepted between Gilliens, Collins and others discussing defendant's shooting and conferring what to do because defendant had "the other ratchet." [1] Collins directed one of his confederates to go to the hospital to see what happened but cautioned him to leave his gun in his vehicle before entering the hospital. Police arrested several individuals outside the hospital and found a .40 caliber handgun inside their vehicle. More intercepted calls between Collins and Gilliens contained discussions about defendant's possession of a handgun and narcotics. Gilliens called defendant's mother and told her defendant would receive bail money if she did not have it, and asked if defendant had a lawyer and said to call him if anything happens. Sergeant Keith Ludwig of the JCPD testified to the contents of a January 13, 2010, wiretap recording where Collins asked someone if they wanted to "get[ ] some weed from Kwa." Defense counsel underscored, and Ludwig agreed, defendant was in the hospital when this call occurred. However, Ludwig testified when a runner was arrested, Collins and Gilliens typically tried to recover the runner's "stash" of drugs. Numerous other state and defense witnesses testified regarding procedures, the subsequent police investigation, and ballistics testing from the shooting. Other witnesses offered ballistics and fingerprint testimony.

Defendant testified that on January 10, 2010, he attended church in the morning, went to the park, and then went to the store for a neighbor. Defendant met a friend inside a neighbor's apartment building, where the police stopped the two, frisked them, and let them go. From there, he attended a baby shower where he walked through a metal detector and security patted him down. Defendant testified police were present at the center where the shower was held. After the shower, defendant helped load gifts and food into cars and then walked towards a corner store.

***3** As defendant turned the corner, he heard a voice yell: "Hey, yo Kwa. Yo Kwa." Defendant testified he saw a red truck with tinted windows. Defendant said "Who that," and the person responded, "Look, you little black mother fucker, you better get the fuck down before I blow your fuckin' brains out." Defendant testified the driver side window was open about four to five inches. Defendant yelled back, "Who's that?" but no one responded, so he said, "suck my dick."

Defendant testified he felt as if someone punched him and he fell to the ground. He sat up and realized someone shot him. Defendant testified his vision was fading but he saw someone get out of the driver-side door of the truck. Defendant described the man as a "heavyset guy, fat, with a fat face," and he thought he was black. Defendant felt someone push him to the ground with force and kick his leg. Someone took his hood and hat off his head and searched his pockets. Defendant's next memory was waking up in the hospital, handcuffed to the bed.

Defendant denied selling drugs for Collins or Gilliens. He testified he had been friends with Boney as a child but their relationship faded away because Boney was selling drugs. Defendant recounted when Boney had shown defendant guns and drugs inside his car and defendant refused to get in

because "that's not [him]. [He] was raised better than that." Defendant knew Collins and Gilliens through Boney and defendant had helped at Collins' father's barbershop. While defendant did not receive a paycheck, sometimes Collins would give him alcohol or "a bag of weed to smoke" as compensation.

Defendant testified he made phone calls for Collins and Gilliens but denied selling drugs. Defendant testified during one phone call when he told Collins there was no more "product," he meant he had smoked all of the marijuana Collins had given him.

C.J. [2] testified on the day of the shooting, he was sitting on his porch and noticed a person sitting behind the driver's seat of a parked vehicle with the window open. He saw a man walk down the street, who he identified as defendant. C.J. heard a gunshot then saw the man in the vehicle exit the driver's side door and bend down to defendant lying on the ground. C.J. did not see a weapon on the ground, but it was dark outside and the vehicle partially blocked his view.

Defendant's sister testified she attempted to collect bail money from Collins because she and her mother were unemployed, but denied defendant sold drugs for Collins and Gilliens and stated Collins never gave her bail money.

Defendant moved for a new trial, arguing the prosecutor's summation resulted in an unjust verdict and the verdict was unsupported by the evidence. On January 10, 2014, the court denied defendant's motion.

In March 2014, defendant filed a second motion for a new trial, this time arguing two jurors failed to provide relevant background information during voir dire. The judge rejected the arguments concerning juror ten but determined it was necessary to interview juror one. On March 21, 2014, after interviewing the juror, the court denied the motion as meritless. On May 29, 2014, the court sentenced defendant to an aggregate sixteen-year prison term with a six-year period of parole ineligibility. This appeal followed.

On appeal, defendant raises the following arguments:

POINT ONE

THE TRIAL COURT'S ATTEMPT TO CURE THE PROSECUTOR'S CLEARLY AND UNMISTAKABLY IMPROPER COMMENTS DURING SUMMATION FAILED TO CORRECT THE ERROR SO THAT THE DEFENDANT WAS DENIED A FAIR TRIAL.

***4** POINT TWO

THE DEFENDANT WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE ON JUROR 1 IF HE HAD KNOWN OF THE JUROR'S FAMILIARITY WITH HIS RELATIVES AND THE CRIME SCENE.

POINT THREE

NOT ONLY DID THE TRIAL COURT ERR WHERE IT IMPROPERLY INSTRUCTED THE JURY REGARDING COUNT 33, BUT NO EVIDENCE WAS PRESENTED TO CREATE A TEMPORAL AND SPATIAL LINK BETWEEN THE FIREARM AND THE DRUGS.

POINT FOUR

THE VERDICT AS TO THE CONSPIRACY ALLEGED IN COUNT 2 WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD BE SET ASIDE.

POINT FIVE

THE TRIAL COURT SHOULD HAVE MERGED COUNT 33 INTO COUNT 2 WHERE THE USE OF THE WEAPON TO COMMIT THE SUBSTANTIVE OFFENSE PROVIDED THE FACTUAL UNDERPINNING FOR DRAWING AN INFERENCE THAT THE WEAPON WAS POSSESSED FOR AN UNLAWFUL PURPOSE.

POINT SIX

THE TRIAL COURT'S FAILURE TO ARTICULATE ITS REASON FOR IMPOSING THREE CONSECUTIVE TERMS IS AN ABUSE OF DISCRETION.

POINT SEVEN

THE DEFENDANT'S SENTENCE WAS INAPPROPRIATE WHERE THE TRIAL COURT FAILED TO ARTICULATE ITS REASONS FOR FINDING THE SOLE AGGRAVATING FACTOR OUTWEIGHED THE TWO APPLICABLE MITIGATING FACTORS.

Defendant raised the following issues in a pro se supplemental brief:

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR IN THE JURY INSTRUCTION AS TO "A COMMUNITY GUN" PURSUANT TO *N.J.S.A.* 2C:39–4(A)(2) (SUPPLEMENTAL TO COUNSEL'S POINT III).

POINT II

THE TRIAL COURT'S ABUSE OF DISCRETION DURING APPELLANT['S] MOTION TO COMPEL RELEVANT INFORMATION OF SGT. THOMAS MCVICAR['S] INTERNAL AFFAIRS RECORDS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

POINT III

THE TRIAL COURT'S ABUSE OF DISCRETION VIOLATED APPELLANT'S RIGHT[S] DURING A NEW TRIAL MOTION TO DUE PROCESS A VIOLATION OF THE FOURTEENTH AMENDMENT [sic].

A. BEING PRESENT ACCORDING TO NEW JERSEY SUPREME [COURT] *RULE* 3:16(B) FOR A NEW TRIAL MOTION

B. FAILURE TO MAKE A RECORD OF THE IN CAMERA INTERVIEW ACCORDING TO NEW JERSEY SUPREME [COURT] *RULE* 1:2–2, VERBATIM RECORD OF PROCEEDING

I.

We first address defendant's argument that statements made by the prosecutor during summation substantially prejudiced his right to a fair trial and the trial court erred in its curative instruction, requiring reversal of defendant's conviction.

Reversible error occurs when a prosecutor makes a comment so prejudicial that it deprives a defendant of his or her right to a fair trial. *State v. Mahoney*, 188 *N.J.* 359, 376, *cert. denied*, 549 *U.S.* 995, 127 *S. Ct.* 507, 166 *L. Ed.* 2d 368 (2006). Moreover, the prosecutor can make fair comments about the evidence presented. *State v. Atwater*, 400 *N.J. Super.* 319, 335 (App. Div. 2008).

After reviewing the record, we reject defendant's argument. When assessing whether prosecutorial misconduct requires reversal we must determine whether "the conduct was so egregious that it deprives the defendant of a fair trial." *State v. Loftin*, 146 *N.J.* 295, 386 (1996) (quoting *State v. Ramseur*, 106 *N.J.* 123, 322 (1987)). We consider such factors as whether defense counsel made a timely objection, whether the remark was withdrawn promptly, whether the trial judge ordered the remarks stricken, and whether the judge instructed the jury to disregard them. *Ramseur*, *supra*, 106 *N.J.* at 322–23. While prosecutors are given "considerable leeway" in summarizing their case to the jury, prosecutors may not make "inaccurate legal or factual assertions" and must "confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." *State v. Smith*, 167 *N.J.* 158, 177–78 (2001) (citations omitted).

***5** At the start of the prosecutor's summation, he said:

> Now, I have—there was a lot of things here, throughout the trial. And one of the things is that Ms. Barnett, defense counsel, she like[s] to misstate facts. She like[s] to manipulate the facts. She doesn't think very highly of myself as a Prosecutor, doesn't think very highly of the Court, or even yourself as the jurors.

Defense counsel objected; however, the prosecutor continued until the trial judge chastised the prosecutor at sidebar. Defense counsel requested a limiting instruction, and the court instructed the jury, "to disregard any comment that [defense counsel] does not respect this Court or yourselves."

The prosecutor's comments were not based on the evidence in the record nor inferences that could be drawn from the evidence. *See Smith*, *supra*, 167 *N.J.* at 178. However, the trial court appropriately addressed the impropriety immediately after it occurred. While the court could have expanded the instruction to clarify the comment was improper and the jury had to decide the case based solely on the evidence at trial, the court's failure to do so does not warrant reversal. The comment was not so egregious as to deny defendant a fair trial. *See State v. Frost*, 158 *N.J.* 76, 83 (1999).

Later, the prosecutor criticized the manner in which defense counsel cross-examined Sarao. He said,

> She [defense counsel] mentioned to you the testimony that came out of him [Sarao]. This is the transcript from that testimony ... [defense counsel] asked these questions with regards to the .9 millimeter. Okay?
>
> The question is: "Okay. Now, it was your testimony, though Sergeant, that you had directed an officer—who-who-who you can't recall his name, take the—this .9 millimeter to the South District. Correct?"
>
> Answer, ... "Not that gun, McVicar's gun."
>
> Okay? We wanted to start confusing the .9 millimeter, the .45 and the .40 caliber. Of course, from members, including myself, who are not familiar with guns, absolutely. Three guns? It would confuse anybody. But here it is.
>
> Question by—by [defense counsel]. "Okay. ... so it's your testimony that you don't know who took the .9 millimeter? What happened to the .9 millimeter? What happened to this gun? This gun, right here, the .9 millimeter?"

The prosecutor continued:

> Ms. Barnett, as if she quite—didn't quite understand it up until this point. "So, just for clarification, it's your testimony that it wasn't the .9 millimeter that was taken down. You indicated on direct examination .... Fennell was the one who watched the gun." "The gun?" "Yes." "This gun right here?"
>
> Answer: "The defendant's gun."

The prosecutor then added, "Okay? Let's not misstate the facts."

Defense counsel did not object to these comments; therefore, we review the statement under the plain error standard pursuant to *Rule* 2:10–2. Defendant argues these comments constituted improper personal attacks directed at defense counsel. However, the prosecutor read the transcript to dispel the notion police mishandled the weapons after the shooting. The prosecutor's remarks here were based on evidence at trial, constituting comment on defendant's theory of the case, and did not deprive defendant of a fair trial. *See Smith*, *supra*, 167 *N.J.* at 178–82.

***6** The additional comments defendant challenges also concerned defendant's theory "five different [law enforcement] agencies" had conspired to frame him and used confidential informants to do so, and his challenges to the credibility of the police witnesses. Defense counsel did not object to these comments at trial.

As to these and the remaining comments defendant challenges, we conclude the remarks did not deny defendant a fair trial, as the prosecutor was responding to remarks made by defense counsel in her summation. *See State v. DePaglia*, 64 *N.J.* 288, 297 (1974).

II.

Next, we address defendant's argument he was denied a fair trial because juror one failed to provide relevant information during voir dire, which would have prompted defendant to exclude her from the jury with a peremptory challenge. Defendant also alleges the court denied him due process and the right to be present for a critical proceeding when the court issued its decision on the record without defendant's presence and when it held an in camera interview of juror one. We disagree.

After the trial, defendant's sister saw a picture on social media. Defendant's sister recognized the woman in the picture as juror one. According to defendant's investigator, one of defendant's acquaintances and juror one, the acquaintance's grandmother, live at the same address. The acquaintance and defendant have a number of mutual friends. Defendant moved for a new trial.

The judge conducted an in camera hearing, where juror one reported she had not lived in the same house as defendant's acquaintance for several years and did not know of defendant prior to trial. She also reported while on the jury, she did not discuss the trial or defendant with her granddaughter. Finding no juror misconduct, the court denied defendant's motion for a new trial.

A court should grant a motion for a new trial only if the defendant's submissions "clearly and convincingly" establish "a manifest denial of justice." *R.* 3:20–1; *State v. Loftin*, 287 *N.J. Super.* 76, 107 (App. Div.), *certif. denied*, 144 *N.J.* 175 (1996). A trial court's ruling on a motion for new trial "shall not be reversed unless it clearly appears that there was a

miscarriage of justice." *State v. Perez*, 177 *N.J.* 540, 555 (2003) (quoting *R.* 2:10–1).

Defendant argues he would have exercised a peremptory challenge to remove juror one from the jury if he had known about the connection to defendant's acquaintance, and therefore, he was unfairly denied the opportunity to exercise a peremptory challenge.

"When a juror incorrectly omits information during voir dire, the omission is presumed to have been prejudicial if it had the potential to be prejudicial." *State v. Cooper*, 151 *N.J.* 326, 349 (1997) (citation omitted). The Court in *In re Kozlov*, 79 *N.J.* 232, 239 (1979), explained:

> Where a juror on *voir dire* fails to disclose prejudicial material ... a party may be regarded as having been denied [a] fair trial. This is not necessarily because of any actual or provable prejudice to his case attributable to such juror, but rather because of his loss, by reason of that failure of disclosure, of the opportunity to have excused the juror by appropriate challenge, thus assuring with maximum possible certainty that he be judged fairly by an impartial jury.

Here, juror one did not withhold relevant information during jury selection. She reported she had no knowledge of defendant prior to trial, nor did she know her granddaughter knew him. Therefore, juror one did not withhold any relevant information and defendant was not denied a fair trial.

***7** Defendant further argues the court denied him due process and the right to be present at two court proceedings, the March 21, 2014 decision denying his second motion for a new trial and the in camera hearing of juror one.

The right to be present at trial is grounded in the Confrontation Clause of the Constitution. *State v. Trent*, 157 *N.J. Super.* 231, 241 (App. Div. 1978), *rev'd on other grounds*, 79 *N.J.* 251 (1979). However, the right to be present is not unlimited. *Ibid.* The right to be present

> extends not to every aspect of the proceeding but rather only to critical stages of the trial, heretofore defined by the Supreme Court as "anything ... new to the proceeding and in conflict with ... [the] right to be confronted by the witnesses, to be represented by counsel, and to maintain ... [the] defense upon the merits."
>
> [*Ibid.* (quoting *State v. Auld*, 2 *N.J.* 426, 433 (1949)).]

A defendant may be excluded from an in camera interview without offending the right to be present, particularly if the defendant did not request to be present, if the issue "was singularly one whose investigation and resolution may well have been impeded by defendant's presence," and the defendant was not prejudiced by the absence. *Ibid.*

Here, defendant was not denied due process or the right to be present. At the March 21, 2014 decision, no witnesses were present, no counsel were present, no arguments were made, and the judge did nothing more than read her decision into the record. Defendant did not miss a critical stage of the trial by not being present when the court issued its decision denying his motion for a new trial. Defendant also had no right to be present for the in camera hearing of juror one. We discern no reason defendant should be entitled to a new trial as his due process rights were not violated.

III.

Defendant argues the court erred by charging the jury on *N.J.S.A.* 2C:39–4.1(a), possession of a weapon during the distribution of controlled dangerous substance (CDS) or a conspiracy to distribute CDS, when the original count charged possession of a community weapon, contrary to *N.J.S.A.* 2C:39–4(a)(2). Because the State moved to amend the indictment, and defense counsel did not object to changing the statute cited from *N.J.S.A.* 2C:39–4(a)(2) to *N.J.S.A.* 2C:39–4.1(a) prior to trial, defendant's argument the court charged the jury with the wrong statute is meritless. However, the judgment of conviction erroneously cited *N.J.S.A.* 2C:39–4(a)(2) as the statute applicable to that count; therefore, we remand to the trial court to correct the error.

Additionally, defendant argues the State failed to prove he was acting as part of a conspiracy to commit a narcotics offense at the moment he was shot and found in possession of a firearm in order to satisfy a conviction under *N.J.S.A.* 2C:39–4.1(a). *N.J.S.A.* 2C:39–4.1(a) states, "Any person who

has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a [narcotics offense] ... is guilty of a crime of the second degree." There must be "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." *State v. Spivey*, 179 *N.J.* 229, 239 (2004). Defendant argues the only evidence offered in support of the conspiracy charge were a few telephone conversations in which he allegedly participated. He underscores his full name was never used in the calls, only the name "Kwa," and prior to the shooting, he was not a suspect in the drug ring.

***8** The court did not err in finding that the conspiracy conviction was supported by the evidence. *N.J.S.A.* 2C:5–2(a) provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Subsection (d) provides that while an overt act in furtherance of the conspiracy is usually required to establish the crime, that is not the case for conspiracy to distribute drugs. *N.J.S.A.* 2C:5–2(d).

Here, police recorded telephone calls between defendant and members of the drug ring discussing drug sales. The jury listened to the calls at trial and during deliberations. The jury evidently rejected defendant's contention he was either relaying messages for his friends or asking Collins for marijuana to smoke, and not to sell. Nothing in the record suggests that the jury erred or the jury's verdict as to count two, conspiracy pursuant to *N.J.S.A.* 2C:5–2, is against the weight of the evidence and should be set aside.

IV.

Defendant argues the trial court erred by denying his request for discovery of McVicar's personal and internal affairs records. We disagree.

"The Sixth Amendment to the United States Constitution and Article 1, Section 10 of the New Jersey Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *State v. Harris*, 316 *N.J. Super.* 384, 397 (App. Div. 1998) (quoting *Davis v. Alaska*, 415 *U.S.* 308, 315, 94 *S. Ct.* 1105, 1110, 39 *L. Ed.* 2d 347, 353 (1974)). That right, however, "does not require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ibid.*

In requests for police personnel records, the court must balance "the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-examination under the Confrontation Clause." *Id.* at 397–98 (citation omitted). Therefore, the party who requests an in camera inspection "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.' " *Id.* at 398 (quoting *State v. Kaszubinksi*, 177 *N.J. Super.* 136, 139 (Law Div. 1980)).

The trial court denied the request for McVicar's records because defendant failed to present a factual predicate for them. Defendant's position was the records could provide relevant information to support the theory McVicar was the initial aggressor. Defendant contends McVicar's records were relevant to McVicar's credibility and to establish whether he had a pattern of excessive force. However, defendant did not present a factual basis to support his request; therefore, we find the trial court properly denied defendant's request for discovery as to personnel and internal affairs records.

V.

***9** Defendant argues the court erred in failing to merge count thirty-three, *N.J.S.A.* 2C:39–4.1(a), into count two, *N.J.S.A.* 2C:5–2. We disagree.

Because defendant did not raise this issue below, we review it under the plain error standard and will only address it if "it is of such a nature as to have been clearly capable of producing an unjust result." *R.* 2:10–2.

The merger doctrine prevents a defendant from receiving multiple punishments for a single wrongdoing. *State v. Tate*,

216 *N.J.* 300, 302 (2013). In deciding whether to merge offenses, our Court explained,

> [w]e follow a "flexible approach" ... that "requires us to focus on the 'elements of the crimes and the Legislature's intent in creating them,' and on 'the specific facts of each case.' " *State v. Cole*, 120 *N.J.* 321, 327 (1990) (quoting *State v. Miller*, 108 *N.J.* 112, 116–17 (1987)). The overall principle guiding merger analysis is that a defendant who has committed one offense " 'cannot be punished as if for two.' " *Miller*, *supra*, 108 *N.J.* at 116 (quoting *State v. Davis*, 68 *N.J.* 69, 77 (1975)). Convictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge.
>
> [*State v. Brown*, 138 *N.J.* 481, 561 (1994).]

Defendant argues count thirty-three should have merged into count two because the two crimes constituted a single wrongdoing. We disagree. Count thirty-three and count two require different elements. Count thirty-three, *N.J.S.A.* 2C:39–4.1(a), requires possession of a firearm in the course of committing, attempting to commit, or conspiring to commit a narcotics offense. Count two, *N.J.S.A.* 2C:5–2(a), does not require the possession of a weapon to find a conspiracy to sell drugs. Thus, count thirty-three required a proof in addition to the proofs required for count two.

Defendant erroneously argues the anti-merger provision in *N.J.S.A.* 2C:39–4.1(d) is not applicable because the indictment charged him with *N.J.S.A.* 2C:39–4(a)(2), not *N.J.S.A.* 2C:39–4.1, and he was not convicted of a crime under chapter 35 or chapter 16, to which *N.J.S.A.* 2C:39–4.1(d) applies. *N.J.S.A.* 2C:39–4.1(d) states, in relevant part, "a conviction arising under this section shall not merge with a conviction for a violation of any of the sections of chapter 35 or chapter 16 referred to in this section nor shall any conviction under those sections merge with a conviction under this section." Defendant's argument is meritless, as previously explained, because defense counsel consented to the amendment of count thirty-three of the indictment to *N.J.S.A.* 2C:39–4.1(a). The anti-merger provision in subsection (d) does not preclude merger with a conspiracy conviction because *N.J.S.A.* 2C:5–2(a) is not one of the offenses referred to in *N.J.S.A.* 2C:39–4.1. We find the court did not err by not merging count thirty-three into count two.

VI.

Defendant argues the trial judge erred in sentencing him to three consecutive terms, specifically on counts thirty-three and thirty-five, possession of a weapon for an unlawful purpose, as they should be served concurrently because they were not independent crimes, but rather, occurred at the same time and place. Because the trial judge failed to provide her findings on the record as to why she sentenced defendant to three consecutive terms, we remand.

***10** "[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." *State v. Blackmon*, 202 *N.J.* 283, 297 (2010). We consider whether the trial court has made findings of fact grounded in reasonably credible evidence, whether the factfinder applied correct legal principles in exercising discretion, and whether application of the facts to law has resulted in a clear error of judgment and to sentences that "shock the judicial conscience." *State v. Roth,* 95 *N.J.* 334, 363–65 (1984). We review a trial judge's findings as to aggravating and mitigating factors to determine whether the factors are based on competent, credible evidence in the record. *Id.* at 364. "To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." *State v. Case*, 220 *N.J.* 49, 65 (2014); *see R.* 3:21–4(g).

Pursuant to *N.J.S.A.* 2C:44–5(a), when a defendant receives multiple sentences of imprisonment "for more than one offense, ... such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." *N.J.S.A.* 2C:44–5(a) does not state when consecutive or concurrent sentences are appropriate. The Supreme Court in *State v. Yarbough*, 100 *N.J.* 627, 643–44 (1985), *cert. denied*, 475 *U.S.* 1014, 106 *S. Ct.* 1193, 89 *L. Ed.* 2d 308 (1986), set forth the following guidelines:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominately independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]

What was guideline six was superseded by a 1993 amendment to *N.J.S.A.* 2C:44–5(a), which provides that there "shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

The *Yarbough* guidelines leave a "fair degree of discretion in the sentencing courts." *State v. Carey*, 168 *N.J.* 413, 427 (2001). "[A] sentencing court may impose consecutive sentences even though a majority of the *Yarbough* factors support concurrent sentences," *id.* at 427–28, but the court must state its reasons for imposing consecutive sentences, and when a court fails to do so, remand is needed in order for the court to place its reasoning on the record, *State v. Miller*, 205 *N.J.* 109, 129 (2011). Here, the only reasoning provided by the court was that *N.J.S.A.* 2C:39–4.1(d) required the sentence on count thirty-three to be served consecutive to count two. [3] Because the distribution of CDS is among the chapter 35 offenses required to run consecutively pursuant to *N.J.S.A.* 2C:39–4.1(d), the court correctly found count two and count thirty-three were to run consecutively.

As to count thirty-five and count thirty-three, the court provided no reasons for why those two counts were to run consecutively. Count thirty-five, *N.J.S.A.* 2C:39–4A, is not within the enumerated offenses in *N.J.S.A.* 2C:39–4.1(d), which requires the two counts to run consecutively. Because the record does not explain why the court ran the two counts consecutively, we remand for resentencing.

***11** At sentencing, the court noted the shooting left defendant blind, but stated, "I don't sentence people based upon who they are in front of me today, I consider who they are in front of me today, but I need to sentence based on crimes." The court found mitigating factors seven, defendant led a law-abiding life, and eight, defendant's conduct was unlikely to reoccur, as well as aggravating factor nine, the need for deterrence. The court found aggravating factor nine outweighed the mitigating factors "because ... it is a qualitative, not a quantitative, under the circumstances, and the charge and the nature of the offense, I do find that the aggravating factor outweighs the mitigating [factors]." The court did not explain its basis for reaching that conclusion.

A sentencing court may find aggravating and mitigating factors that appear internally inconsistent, but the court must support the findings with a "reasoned explanation" "grounded in competent, credible evidence in the record." *Case*, *supra*, 220 *N.J.* at 67. Specifically, as to a finding of aggravating factor nine and mitigating factor eight, it must "specifically explain[ ]" why the court found the need to deter defendant outweighed whether defendant's conduct was unlikely to reoccur based upon the circumstances. *See State v. Fuentes*, 217 *N.J.* 57, 63 (2014).

The trial court also failed to consider the two parts of aggravating factor nine, the general and specific need to deter. A sentencing court must qualitatively analyze the risk of both general and specific deterrence in relation to the particular defendant. *Id.* at 78. The trial court did not discuss any reason for finding aggravating factor nine besides "there is always a need to deter [defendant] and others from violating the law." That we must always deter people from violating the law is not enough of analysis to satisfy a sentencing court's obligation to provide a reasoned explanation for why an aggravating factor applies.

Affirmed as to defendant's conviction and sentence except as to counts thirty-three and thirty-five, where we vacate and remand for resentencing for the trial judge to explain the basis for imposing consecutive sentences. We also remand for the trial court to correct the judgment of conviction to recite the statute under which defendant was convicted on count thirty-three. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2017 WL 1737906

Footnotes

1 According to police testimony “ratchet” is slang for gun.

2 We use initials to protect the identity of non-party witnesses.

3 Defendant again attempts to argue he was never charged with *N.J.S.A.* 2C:39–4.1(a), however, as mentioned twice previously, defense counsel consented to the State amending count thirty-three of the indictment to replace *N.J.S.A.* 2C:39–4(a)(2) with *N.J.S.A.* 2C:39–4.1(a).

2015 WL 3843309
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Eric E. POTTER, Defendant–Appellant.

A-1175-12T3
|
Submitted March 18, 2015.
|
Decided June 23, 2015.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 10–08–1447.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Acting Monmouth County Prosecutor, attorney for respondent (Paul H. Heinzel, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges WAUGH, MAVEN, and CARROLL.

Opinion

PER CURIAM.

***1** Defendant Eric E. Potter appeals his conviction for third-degree possession of a controlled dangerous substance, *N.J.S.A.* 2C:35–10(a)(1) (count one); second-degree possession of heroin in a quantity of one-half ounce or more with the intent to distribute, *N.J.S.A.* 2C:35–5(b)(2) (count two); and third-degree possession of heroin with the intent to distribute within 1000 feet of a school, *N.J.S.A.* 2C:35–7 (count three). We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

A.

On the evening of April 26, 2010, Officer Eddy Raisin of the Street Crimes Unit (Unit) of the Asbury Park Police Department met with a confidential informant who had provided reliable information in the past. The informant told him that Potter was known to walk from the Vita Garden Apartments in Asbury Park during the early morning hours to a house on Bangs Avenue, where he would play poker on the second floor and sell heroin. To reach Bangs Avenue, he would cut through a municipal basketball court.[1] The informant provided a physical description of Potter.

Shortly before 10:00 a.m., on April 27, Raisin met at police headquarters with other members of his Unit, including Lieutenant David Desane, Officer Lorenzo Pettway, Officer Adam Mendes, and Officer Kamil Warraich, as well as members of the Monmouth County Narcotics Strike Force, including Detectives Todd Rue, Scott Samis, and Christopher Camilleri. After the meeting, they set up surveillance sites at the basketball court, Bangs Avenue, and the street connecting the two, using unmarked police cars.

Warraich and Camilleri's vehicle was in a parking lot near the basketball courts. Raisin and Mendes were on the connecting street and had a clear view of the basketball courts. Desane, Samis, and Pettway positioned their vehicle so they could view the house on Bangs Avenue, but they could not observe the basketball court from their location.

At approximately 11:40 a.m., Raisin observed a man matching Potter's description heading from the Vita Garden Apartments toward the basketball courts. Raisin immediately told Warraich to drive toward the basketball courts and approach Potter.

Warraich and Camilleri left the parking lot, drove closer to the courts, and parked. They got out of the vehicle and approached Potter. While doing so, Warraich positioned himself to Potter's right side and Camilleri positioned himself to the left. Warraich asked Potter for his name and what he was doing in the area.

Before Potter answered, Warraich observed a clear, "Ziploc[-]type" plastic bag in the front right pocket on the outside of Potter's jacket. Although the bag was inside the pocket, it was visible because the bag created a bulge that kept the pocket open. Warraich could also see the packages in the bag, which were wrapped in paper and shaped like a small brick.

Based on his training and experience, including having "seen plenty of bricks of heroin," Warraich concluded that the bag contained drugs.[2] Warraich immediately placed Potter under arrest and removed the plastic bag from his pocket. The bag contained several bricks of what was subsequently identified as heroin. A search incident to the arrest uncovered a second plastic bag in Potter's left pocket that also contained several bricks of what proved to be heroin. Nine unbundled packets of heroin were also recovered. Following his arrest, Potter was transported to police headquarters, where another search revealed that Potter was carrying $1520 in cash.

***2** Warraich turned the plastic bags and nine loose packets over to Officer Raisin. In his investigation report, Raisin recorded his inventory of the two bags. One of them contained 498 glassine packets, 298 of which bore the stamp "Candy Girl," 150 of which were stamped "Extra Power," and 50 of which were stamped "Knockout." The other bag held 350 glassine packets, 150 of which were stamped "Candy Girl," 150 of which bore the stamp "Extra Power," and 50 of which were stamped "Knockout."

At police headquarters, Potter was interviewed by Samis and Raisin. The interview was videotaped and transcribed. Before the start of the interview, Samis informed Potter of his *Miranda*[3] rights. Potter initialed a *Miranda* form acknowledging, among other things, that he was waiving his right to remain silent, his right to consult with an attorney, and his right to have one present during the interview. Potter also acknowledged that he had been informed that his decision to waive his rights was not final and could be revoked at any time during the interview.

During the interview, Potter admitted that he was told by another person to pick up the two bags and deliver them to someone he did not identify. There was one buyer for the larger bag for $2500 and another for the smaller bags for around $1800. Potter expected to receive $300 for facilitating the transactions. He told the officers that he had four or five customers and was averaging a couple of bundles a day in sales. He also asserted that the quantity he had with him that day was a lot more than he usually sold. Potter maintained that he used the money to buy food and support himself.

At the end of the interview, Samis told Potter that they would "let [him] make phone calls" once they found out what the bail amount would be. According to Samis, Potter had not asked to make a phone call prior to that exchange.

B.

Potter was indicted on August 4, and pled not guilty on September 27. He was assigned counsel from the Office of the Public Defender at his arraignment. On December 16, Potter filed a motion seeking to represent himself. Potter's attorney subsequently joined the motion.

At oral argument on April 12, 2011, Potter's attorney advised the judge that Potter had been denied the opportunity to represent himself in a prior case, and that the denial had been reversed on appeal. He also requested the judge explain the risks of self-representation to Potter.

The judge then informed Potter of his right to remain silent and explained that the risks of self-representation included self-incrimination and lack of familiarity with the court rules and the rules of evidence. She questioned Potter about his familiarity with hearsay. Potter responded: "[I]t's just hearsay. It's not no proven fact.... It's just the evidence." He acknowledged having some familiarity with the New Jersey Rules of Evidence. The judge expressed some concern and explained that "there are a lot of technical issues that can come up that an attorney may be able to use to your benefit that you may not be aware of."

***3** Potter explained that he wanted to represent himself because he had a different trial strategy than his appointed counsel, and he felt he was qualified. Potter acknowledged that he had represented himself at trial in the past. Potter also told the judge that he had taken paralegal courses while in prison.

The judge repeatedly expressed her concern about the possible adverse consequences of his decision, but Potter continued to express his desire to represent himself. The judge ultimately allowed Potter to proceed pro se, but with standby counsel.

Potter's attorney had filed a motion to suppress the evidence seized on the day of his arrest. The judge heard some testimony on that issue on April 14. Warraich and Raisin testified for the State. The judge then adjourned the hearing pending disposition of Potter's motion to compel production of the personnel records of certain members of the Asbury Park Police Department and the Monmouth County Prosecutor's Office. That motion was denied on May 12.

The motion to suppress resumed on May 26, with testimony by Camilleri, Samis, Rue, and others. On July 19, following the presentation of additional evidence, the judge placed an oral decision on the record. She found that both Warraich and Camilleri were credible witnesses, and that Warraich was very knowledgeable about the packaging of narcotics. She concluded that Warraich had sufficient reasonable suspicion to warrant an investigative stop. The judge found that Warraich observed Potter carrying drugs in plain view when he sought to question him, which provided probable cause for the arrest and the subsequent search.

Potter filed a motion to dismiss the indictment on August 25. The judge assigned to conduct the trial heard oral argument on the motion on November 3, and issued a written decision and order denying the motion six days later.

On December 2, Potter filed a motion to suppress the statements he made to the police following his arrest, arguing (1) that the police coerced him to make the statement through a promise; (2) that he was suffering from heroin withdrawal at the time; and (3) that he did not know he was being videotaped.

The trial judge conducted a hearing on that motion on March 13, 2012. The following day, he issued an order and a written decision. The judge concluded (1) that Potter had failed to present evidence of the existence of any promise, much less a promise that overbore his will, (2) that there was no evidence presented that he was suffering from heroin withdrawal, and (3) that Potter had no privacy right with respect to his statement because he had been told it would be recorded, if not videotaped.

The trial testimony began on March 21, and continued for three additional days.[4] The officers and detectives involved in the April 27, 2010 operation testified. The State also presented testimony from the property clerk at the Asbury Park Police Department and a forensic scientist from East Regional Laboratory who testified that more than half an ounce of heroin had been seized.

***4** Detective George Snowden of the Monmouth County Narcotics Strike Force was qualified as the State's expert witness on narcotics distribution in Monmouth County. He testified that heroin is typically sold and packaged in a glassine envelope, bag, or "deck" that is "a one by one-and-a-half waxine folded-up envelope with ... a stamp[ed] brand[ ] on it." According to Snowden, a glassine packet typically contains between .01 and .05 grams of heroin and costs between $3 and $10 a bag. The price varies based on the neighborhood, the relationship between the buyer and seller, and the quantity being purchased.

Snowden explained that a bundle of heroin consists of ten glassine packets bound together by a rubber band. A brick of heroin is a larger unit consisting of five bundles (fifty packets of heroin), wrapped in newspaper, magazine paper, or white paper, but most commonly magazine paper. Large quantities of heroin are typically distributed in bricks. Snowden testified that in his opinion the possession of 850 packets of heroin and approximately $1500 in cash was indicative of intent to distribute rather than personal use.

The jury found Potter guilty on all counts. He was sentenced on July 19. The State moved for a mandatory extended term, pursuant to *N.J.S.A.* 2C:43–6(f), based on Potter's previous conviction for possession of CDS with the intent to distribute. The trial judge granted the motion.

In sentencing Potter, the judge found three aggravating factors and no mitigating factors. He imposed a sentence of fifteen years in prison with seven-and-one-half years of parole ineligibility pursuant to *N.J.S.A.* 2C:43–6(f). He explained his reasons for the sentence as follows:

> On the aggravating factors, the risk [Potter] will commit another offense, the extent of his prior record and the need to deter [Potter] and others from violating the law. There are no mitigating factors. [Potter] has seven prior municipal court convictions. He [has] been convicted in Superior Court nine times. He's a habitual criminal. He's somebody who for whatever reason is bent on spending the bulk of his life behind bars. That's his decision.
>
> With reference to the sentence in this matter, the State contends and has indicated to the [c]ourt that [Potter] should be sentenced on the second count of the indictment and the other counts merge with it. I therefore will go along

with that recommendation. I have, however, decided that this is an extended term and there is clearly a situation where a stipulated period of parole ineligibility would apply. As I have indicated, [Potter] is a career criminal. Not to the extent that he's involved in organized crime, but he's involved in illegal activity constantly.

On the second count, I merge the other two counts into this[;] he's sentenced to 15 years [in a] New Jersey State Prison. There's seven and a half years of parole ineligibility.

This appeal followed.

II.

Potter raises the following appellate arguments through counsel:

***5** *POINT I:* THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S ERRONEOUS INSTRUCTION ON THE LAW PERTAINING TO THE QUANTITY REQUIREMENT FOR A SECOND [-]DEGREE INTENT TO DISTRIBUTE CDS CRIME. (Not Raised Below)

POINT II: THE DEFENDANT'S RIGHT TO CONFRONTATION, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION, AND THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE ADMISSION OF ACCUSATIONS FROM ABSENTEE WITNESSES ABOUT PRIOR CRIMES ALLEGEDLY COMMITTED BY THE DEFENDANT. (Not Raised Below)

A. THE POLICE IMPROPERLY INFORMED JURORS THAT THE DEFENDANT WAS UNDER SURVEILLANCE FOR NARCOTICS OFFENSES.

B. THE FACT THAT THE POLICE HAD THE DEFENDANT UNDER SURVEILLANCE FOR NARCOTICS OFFENSES HAD NO PROBATIVE VALUE AND WAS UNDULY PREJUDICIAL.

C. THE STATE IMPROPERLY ELICITED OTHER–CRIME EVIDENCE THAT THE DEFENDANT HAD BEEN SELLING DRUGS ON PRIOR OCCASIONS.

D. THE TRIAL COURT FAILED TO GIVE A PROPER LIMITING INSTRUCTION.

POINT III: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY PROSECUTORIAL MISCONDUCT. (Not Raised Below)

POINT IV: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF THE STATE'S EXPERT WITNESS' TESTIMONY CONCERNING MATTERS WELL WITHIN THE KEN OF THE AVERAGE JUROR. (Not Raised Below)

POINT V: THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE DEFECTIVE WAIVER PROCEDURE.

POINT VI: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT EXPRESSLY DISAVOWED ITS OBLIGATION TO ENSURE A FAIR TRIAL, RESULTING IN UNFAIR PREJUDICE. (Not Raised Below)

POINT VII: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED WHEN THE STATE'S LAY WITNESS RENDERED

HIGHLY PREJUDICIAL OPINIONS THAT SHOULD HAVE BEEN EXCLUDED. (Not Raised Below)

POINT VIII: THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT WAS VIOLATED, AND THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THOSE GROUNDS.

***6** *POINT IX:* THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 7 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE UNLAWFUL DETENTION AND SEARCH OF THE DEFENDANT.

A. THE DEFENDANT WAS UNLAWFULLY DETAINED.

B. THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE DEFENDANT.

POINT X: THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT'S WAIVER OF MIRANDA RIGHTS HAD BEEN MADE KNOWINGLY AND VOLUNTARILY.

POINT XI: THE SENTENCE IS EXCESSIVE.

A. THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

B. THE COURT MADE FINDINGS OF FACT TO ENHANCE THE SENTENCE.

Potter filed a pro se supplemental brief in which he argued the following points:

POINT I: THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT[']S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947.

POINT II: THE INSTRUCTIONS BY THE TRIAL JUDGE TO THE JURY EXCEEDED THE BOUNDS OF FAIR COMMENT AND CONSTITUTED PREJUDICIAL ERROR AND DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947.

POINT III: THE DEFENDANT[']S RIGHT TO CONFRONTATION AS [GUARANTEED] BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947, AND THE DEFENDANT[']S RIGHT TO DUE PROCESS THAT IS [GUARANTEED] BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT DENIED THE DEFENDANT[']S MOTION TO OBTAIN THE POLICE RECORDS OF THE STATE[']S WITNESSES.

A.

We begin our discussion of the issues with Potter's argument that the motion judge erred by granting his motion for leave to represent himself.

By way of background, we note that this trial was not the first in which Potter sought to represent himself. He represented himself during a trial held in January 2005, and was convicted. *State v. Potter,* A–4213–04 (App. Div. June 25, 2007) (slip op. at 5–8), *certif. denied,* 192 *N.J.* 482 (2007). He appealed, arguing, as he does here, that the trial judge should not have allowed him to represent himself. *Id.* at 8. We found no merit in that argument, and affirmed the conviction. *Id.* at 3, 8. Potter was then denied the opportunity to represent himself during a trial held in June 2005, and was convicted. *State v. Potter,* A–1291–05 (App.Div. July 31, 2007) (slip op at 1–3), *certif. denied,* 193 *N.J.* 586 (2008). He appealed, arguing in part that he should have been allowed to represent himself. *Id.* at 2. We reversed on that basis. According to Potter, the case was not retried.

We review the judge's determination that Potter's waiver of his right to counsel was knowing and intelligent under an abuse of discretion standard. *See State v. DuBois,* 189 *N.J.* 454, 475 (2007). A "[d]efendant possesses both the right to counsel and the right to proceed to trial without counsel." *Id.* at 465. In *State v. Crisafi,* 128 *N.J.* 499, 509 (1992), the Court explained that a defendant may "exercise the right to self-representation

only by first knowingly and intelligently waiving the right to counsel." In *State v. DuBois, supra,* 189 *N.J.* at 467 (citing *Crisafi, supra,* 128 *N.J.* at 311–12), the Court also directed:

> ***7** [W]hen determining whether a waiver of counsel is knowing and intelligent, trial courts must inform defendant of: (1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that lack of knowledge of the law may impair defendant's ability to defend himself; (5) the impact that the dual role of counsel and defendant may have; and (6) the reality that it would be unwise not to accept the assistance of counsel.

The Court set forth additional requirements to the process, specifically that

> (1) the discussions should be open-ended for defendants to express their understanding in their own words; (2) defendants should be informed that if they proceed pro se, they will be unable to claim they provided ineffective assistance of counsel; and (3) defendants should be advised of the effect that self-representation may have on the right to remain silent and the privilege against self-incrimination.
>
> [*Id.* at 468 (citing *State v. Reddish,* 181 *N.J.* 553, 594–95 (2004)).]

In analyzing a defendant's responses to these concerns, the court should " 'indulge [in] every reasonable presumption against waiver.' " *State v. King,* 210 *N.J.* 2, 19 (2012) (alteration in original) (quoting *State v. Gallagher,* 274 *N.J.Super.* 285, 295 (App.Div.1994)). "Only in the rare case can the record support a finding that, in the absence of such a searching examination, a defendant did indeed 'fully appreciate[ ] the risks of proceeding without counsel, and ... decide[ ] to proceed pro se with his eyes open.' " *Id.* at 20 (alterations in original) (quoting *Crisafi, supra,* 128 *N.J.* at 513). The "ultimate focus" of this inquiry is on the defendant's "actual understanding of the waiver of counsel." *Crisafi, supra,* 128 *N.J.* at 512.

Having reviewed the transcript of Potter's questioning by the motion judge concerning his request to represent himself, we find that the record reflects full compliance with the requirements of *Reddish* and *DuBois.* Although the judge might have explained that Potter's response to her question about hearsay was incorrect, her failure to do so does not warrant reversal. She clearly expressed her concern that "there are a lot of technical issues that can come up that an attorney may be able to use to your benefit that you may not be aware of." Potter was adamant that he wanted to represent himself, as he had been in the past. Potter identified the risk that he would be found guilty as a risk of self-representation. When the judge asked him if he thought that "if [he] was represented by an attorney, that risk might have been lowered based upon the attorney's knowledge of the law," Potter responded: "No." The judge was not obligated to provide instruction concerning the law of hearsay.

B.

***8** We next turn to the pretrial suppression issues concerning the evidence seized when Potter was arrested and the statement taken after he was brought to police headquarters.

The Supreme Court has explained the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress as follows:

> [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [*State v. Elders,* 386 *N.J.Super.* 208, 228 (App.Div.2006)] (citing *State v. Locurto,* 157 *N.J.* 463, 474 (1999)); *see also State v. Slockbower,* 79 *N.J.* 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the ... investigatory search [was] not based on probable cause"); *State v.. Alvarez,* 238 *N.J.Super.* 560, 562–64 (App.Div.1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present

in the record" (citing *State v. Johnson,* 42 *N.J.* 146, 164 (1964))).

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Johnson, supra,* 42 *N.J.* at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. *Id.* at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *Ibid.*

[*State v. Elders,* 192 *N.J.* 224, 243–44 (2007) (third alteration in original).]

Our review of the motion judge's legal conclusions is plenary. *State v. Harris,* 181 *N.J.* 391, 420–21 (2004), *cert. denied,* 545 U.S. 1145, 125 S.Ct. 2973, 162 *L. Ed.*2d 898 (2005); *State v. Goodman,* 415 *N.J.Super.* 210, 225 (App.Div.2010), *certif. denied,* 205 *N.J.* 78 (2011).

i.

We start with the search and seizure issue. Under the Fourth Amendment of the United States Constitution and article I, paragraph 7 of the New Jersey Constitution, "[a] warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Cooke,* 163 *N .J.* 657, 664 (2000) (citing *State v. Alston,* 88 *N.J.* 211, 230 (1981)). The same is true of the warrantless seizure of a person or property. *Terry v. Ohio,* 392 *U.S.* 1, 19–21, 88 *S.Ct.* 1868, 1879–80, 20 *L. Ed.*2d 889, 905–06 (1968) (seizure of a person); *State v. Hempele,* 120 *N.J.* 182, 218–19 (1990) (seizure of property).

***9** The seizure of a person occurs in a police encounter if the facts objectively indicate that "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *State v. Tucker,* 136 *N.J.* 158, 166 (1994) (quoting *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 *L. Ed.*2d 389, 402 (1991)) (internal quotation marks omitted). In applying that test, our courts implement the constitutional guarantee to protect the "reasonable expectations of citizens to be 'secure in their persons, houses, papers and effects.' " *Id.* at 165 (quoting *N.J. Const.* art. I, ¶ 7).

The Supreme Court has defined a field inquiry as "the least intrusive" form of police encounter, occurring when a "police officer approaches a person and asks 'if [the person] is willing to answer some questions.' " *State v. Pineiro,* 181 *N.J.* 13, 20 (2004) (alteration in original) (quoting *State v. Nishina,* 175 *N.J.* 502, 510 (2003)). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.' " *Ibid.* (alteration in original) (quoting *Nishina, supra,* 175 *N.J.* at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.' " *State v. Privott,* 203 *N.J.* 16, 24 (2010) (quoting *State v. Maryland,* 167 *N.J.* 471, 483 (2001)).

In contrast to a field inquiry, an investigatory stop, also known as a *Terry* stop, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. *State v. Stovall,* 170 *N.J.* 346, 355–56 (2002); *see also Terry, supra,* 392 U.S. at 19, 88 S.Ct. at 1878–79, 20 *L. Ed.*2d at 904.

The *Terry* exception to the warrant requirement permits a police officer to detain an individual for a brief period, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *State v. Rodriguez,* 172 *N.J.* 117, 126 (2002) (quoting *Terry, supra,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 *L. Ed.*2d at 906). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." *State v. Davis,* 104 *N.J.* 490, 504 (1986). There is no mathematical formula for deciding whether the totality of circumstances provides the required articulable or particularized suspicion and, [a]s the case law suggests, the test is qualitative, not quantitative. *Stovall, supra,* 170 *N.J.* at 370.

***10** Our review of the record convinces us that the motion judge did not err when she denied the motion to suppress. The testimony was that the two officers approached Potter

and stopped on either side of him. As Warraich asked for his name and what he was doing at the time, he observed what he believed to be drugs in plain view. We consider that interaction to have been a simple field inquiry, rather than an investigatory stop. There was nothing "harassing, overbearing, or accusatory in nature," *Pineiro, supra,* 181 *N.J.* at 20 (quoting *Nishina, supra,* 175 *N.J.* at 510), with respect to the actions of the police. As Raisin testified, the arrest took place "30 seconds" after Camilleri and Warraich approached Potter.

Even if the interaction is viewed as an investigatory stop, we find that there were sufficient facts known to and observed by the officers for them to have had "a reasonable suspicion of criminal activity," *Rodriguez, supra,* 172 *N.J.* at 126. Raisin had been told by a reliable informant that Potter regularly walked a specific route, from Vita Garden Apartments, through a specific basketball court, to play cards and sell heroin at a specific building on Bangs Avenue. Raisin testified that he was told by the informant that Potter carried drugs with him when he went to Bangs Avenue, and the judge credited that testimony. During the surveillance on April 27, 2010, the police officers observed Potter traveling that route, as predicted by the informant. Information provided to the police by a reliable informant may generate the reasonable suspicion necessary for an investigatory stop. *Davis, supra,* 104 *N.J.* at 505–06.

Once the bags containing the drugs were seen in plain view, there was probable cause for the arrest. Searches incident to a lawful arrest are a well-established exception to the warrant requirement. *State v. Pena–Flores,* 198 *N.J.* 6, 19 (2009).

ii.

We now turn to the *Miranda* issue. A trial judge will admit a confession into evidence only if the State has proven beyond a reasonable doubt, based on the totality of the circumstances, that the suspect's waiver of those rights was knowing, intelligent, and voluntary. *State v. Patton,* 362 *N.J.Super.* 16, 42 (App.Div .), *certif. denied,* 178 *N.J.* 35 (2003). In reviewing a trial judge's ruling on a *Miranda* motion, we analyze police-obtained statements using a "searching and critical" standard of review to ensure that constitutional rights have not been trampled upon. *Patton, supra,* 362 *N.J.Super.* at 43 (citations and internal quotation marks omitted). We generally will not "engage in an independent assessment of the evidence as if [we] were the court of first instance," *State v. Locurto,* 157 *N.J.* 463, 471 (1999), nor will we make conclusions regarding witness credibility, *State v. Barone,* 147 *N.J.* 599, 615 (1997). Instead, we generally defer to the trial judge's credibility findings. *State v. Cerefice,* 335 *N.J.Super.* 374, 383 (App.Div.2000).

***11** A suspect's confession during a custodial interrogation can only be obtained if that suspect was supplied with his or her *Miranda* rights. *Miranda, supra,* 384 U.S. at 461, 86 S.Ct. at 1620–21, 16 *L. Ed.*2d at 716. Before considering the validity of a waiver of *Miranda* rights, it must be established that the police scrupulously honored the suspect's right to remain silent. *State v. Burno–Taylor,* 400 *N.J.Super.* 581, 589 (App.Div.2008). If the suspect's words or conduct, upon being advised of his or her rights, "could not reasonably be viewed as invoking the right to remain silent," this requirement is satisfied and the police may continue their questioning. *Id.* at 590 (citing *State v. Bey,* 112 *N.J.* 123, 136–38 (1988)).

The trial judge determined, by the required standard, that the State had demonstrated that Potter had freely and voluntarily waived his *Miranda* rights after they had been appropriately explained to him. He rejected Potter's assertions that he was promised lenient treatment if he identified the person who had supplied him with the heroin, noting that there was no evidence of such a promise and that he had not, in fact, identified his supplier. He further found that there was no evidence that Potter was suffering from heroin withdrawal when the waiver took place, and that, even if Potter was not aware that the statement was being videotaped, there was no obligation to so inform him, citing *State v. Vandever,* 314 *N.J.Super.* 124, 127–28 (App.Div.1998). Those findings and conclusions are fully supported by the record, the trial judge's findings of fact, and the applicable law.

On appeal, Potter argues for the first time that he was denied the opportunity to seek the advice of counsel over the telephone. There is no evidence in the record to support that claim. The fact that Samis told Potter at the end of the interview that he could make telephone calls once they found out what his bail was does not support Potter's claim.

C.

We now turn to the issues raised with respect to the sentence. Potter alleges that it was excessive and illegal because it was based on impermissible judicial factfinding.

"[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." *State v. Blackmon,* 202 *N.J.* 283, 297 (2010) (citing *State v. Jarbath,* 114 *N.J.* 394, 401 (1989)). "In conducting the review of any sentence, appellate courts always consider whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether 'the factfinder [has] appl[ied] correct legal principles in exercising its discretion.' " *Ibid.* (alterations in original) (quoting *State v. Roth,* 95 *N.J.* 334, 363 (1984)). The traditional articulation of this standard limits a reviewing court's scope of review to situations in which the application of the facts to law has resulted in a clear error of judgment and to sentences that "shock the judicial conscience." *Roth, supra,* 95 *N.J.* at 363–65. If the sentencing court has not demonstrated a clear error of judgment or the sentence does not shock the judicial conscience, appellate courts are not permitted to substitute their judgment for that of the trial judge. *Id.* at 364–65.

***12** "In exercising its authority to impose [a] sentence, the trial court must identify and weigh all of the relevant aggravating factors that bear upon the appropriate sentence as well as those mitigating factors that are 'fully supported by the evidence.' " *Blackmon, supra,* 202 *N.J.* at 296–97 (quoting *State v. Dalziel,* 182 *N.J.* 494, 504–05 (2005)).

N.J.S.A. 2C:43–6(f) requires, on motion by the prosecutor, an extended term for a person previously convicted of a crime involving the distribution or intended distribution of narcotics, if that person is convicted a second time of such an offense. Potter had the requisite prior drug conviction, and in fact had more than one. We see no error in the judge's selection and weighing of the sentencing factors, nor was there double counting with respect to prior convictions. That Potter will not be eligible for release until he is in his sixties is not a mitigating factor. Potter's cooperation with the police was minimal at best. He did not name his source, and did not plead guilty. The sentence was legal and not excessive.

With respect to judicial factfinding, Potter's reliance on *Alleyne v. United States,* —— *U.S.* ——, 133 *S.Ct.* 2151, 186 *L. Ed.*2d 314 (2013) is misplaced. In *Alleyne,* the Court recognized and differentiated the traditional role of a sentencing judge in applying sentencing factors.

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. *See, e.g., Dillon v. United States,* 560 *U.S.* 817, ——, 130 *S.Ct.* 2683, 2692, 177 *L. Ed.*2d 271 (2010) ("[W]ithin established limits [,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi [v. New Jersey],* 530 *U.S.* [466,] 481, 120 *S.Ct.* 2348, [2358,] 147 *L. Ed.*2d 435[, 449 (2000)] ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute").
>
> [*Id.* at ——, 133 *S.Ct.* at 2163, 186 *L. Ed.*2d at 330 (first, second, third, and eighth alterations in original).]

Our Supreme Court eliminated presumptive sentencing specifically to avoid the situation in which judicial factfinding is used to enhance a sentence. *State v. Natale,* 184 *N.J.* 458, 488 (2005).

D.

Having reviewed Potter's remaining arguments in light of the facts in the record and the applicable law, we find them to be without merit and not warranting an extended discussion in a written opinion. *R.* 2:11–3(e)(2). We add only the following with respect to some of those arguments. Others do not require any discussion.

***13** However, we note first that many of the arguments at issue were not raised in the trial court, and are consequently reviewed under the plain error rule. *See State v. Jenkins,* 178 *N.J.* 347, 360 (2004). Plain error is error that is "clearly capable of producing an unjust result," which should "in the interests of justice" be noticed even if "not brought to the attention of the trial ... court." *R.* 2:10–2; *see also Jenkins, supra,* 178 *N.J.* at 360–61. "[T]he possibility of injustice [must be] 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.' " *State v. Taffaro,* 195 *N.J.* 442, 454 (2008) (quoting *State v. Macon,* 57 *N.J.* 325, 336 (1971)). Plain error in the context of a jury charge is " '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.' " *State v. Adams,* 194 *N.J.* 186, 207 (2008) (quoting *State v. Jordan,* 147 *N.J* . 409, 422 (1997)).

i.

Potter argues for the first time on appeal that the trial judge erred in failing to charge the jury that it should consider how much of the heroin he intended to keep for his personal use in determining whether he possessed "a quantity of one-half ounce or more with the intent to distribute," as required by *N.J.S.A.* 2C:35–5(b)(2). Not only did Potter fail to request such a charge, there was no evidence in the record to suggest that he intended to keep any for himself. In fact, in his statement, Potter said that he had two bags of heroin and intended to sell both of them. Consequently, there was no error and, even if there was, the error did not possess " 'a clear capacity to bring about an unjust result,' " *Adams, supra,* 194 *N.J.* at 207 (quoting *Jordan, supra,* 147 *N.J.* at 422).

ii.

Potter also argues for the first time on appeal that the State improperly introduced, through testimony that Potter was under surveillance at the time of his arrest, evidence of other crimes in violation of *N.J.R.E.* 404(b) and *State v. Cofield,* 127 *N.J* . 328, 338 (1992). Samis testified on direct that there was a surveillance set up on Potter. There was no objection. On cross-examination, when Potter asked Samis why he was under surveillance, Samis responded that they had received information from a confidential informant. Potter did not object to that testimony either, and in fact it was his cross-examination of Samis that invited the mention of the informant. In addition, he never requested a limiting instruction. Although we question whether mention of the surveillance, or the informant, in response to Potter's own question, actually raises an issue under *Cofield,* we are convinced that the testimony at issue does not raise " 'a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached,' " *Taffaro, supra,* 195 *N.J.* at 454 (quoting *Macon, supra,* 57 *N.J.* at 336).

iii.

***14** Potter contends for the first time on appeal that the prosecutor improperly stated in closing argument that Potter was engaged in an ongoing criminal enterprise. The prosecutor argued to the jury that "you can basically see a business model for this defendant." In the absence of an objection, [such] remarks usually will not be deemed prejudicial. *State v. Ramseur,* 106 *N.J.* 123, 322–23 (1987). The failure to object suggests that the defendant did not believe the remarks were prejudicial at the time they were made and deprives the court of an opportunity to take curative action. *State v. Bauman,* 298 *N.J.Super.* 176, 207 (App.Div.), *certif. denied,* 150 *N.J.* 25 (1997). In any event, the prosecutor's argument was a fair comment on that portion of Potter's statement to the police in which he said that he obtained drugs from a supplier and sold the drugs for profit. He also told them that he used the money derived from the transactions to support himself.

iv.

Potter also asserts for the first time on appeal that expert testimony in this case was improper because the expert opined that the heroin was possessed with the intent to distribute. Such testimony is specifically permitted by the Supreme Court, which held in *State v. Sowell,* 213 *N.J.* 89, 103–05 (2013) that ordinary jurors cannot be expected "to understand the difference between drugs possessed for distribution as opposed to personal use." In any event, Potter admitted in his statement to the police that he had the heroin with him because he intended to sell it.

We also find no reason to reverse on the basis of Warraich's testimony to his belief that the plastic bag in Potter's pocket contained heroin, testimony to which there was no objection. Although Warraich had not been qualified as an expert, his testimony was not offered to prove that the bags contained heroin, but rather offered to show why he arrested Potter. The State called a qualified expert to testify to her analysis of a portion of the contents of the bags seized from Potter, which established that there was more than one half of an ounce of heroin. The testimony at issue does not raise " 'a reasonable doubt as to whether [any] error led the jury to a result it otherwise might not have reached,' " *Taffaro, supra,* 195 *N.J.* at 454 (quoting *Macon, supra,* 57 *N.J.* at 336).

v.

Potter argues that he should have been allowed access to the personnel records of the police officers and detectives who conducted the surveillance. He bases his claim on information given to him by an inmate with whom he spoke while awaiting trial in the Monmouth County Correctional Facility.[5] The

allegations had no bearing on the case against Potter and were not factually supported at the time of the motion.

Although a defendant may attack a prosecution witness's credibility by revealing possible biases, prejudices, or ulterior motives as they relate to the issues in the case, *State v. Harris,* 316 *N.J.Super.* 384, 397 (App.Div.1998), the question of whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records against a defendant's right of confrontation. *Id.* at 397–98. To obtain such records, a defendant must advance 'some factual predicate which would make it reasonably likely' that the records contain some relevant information, and establish that the defendant is not merely engaging in a fishing expedition. *Id.* at 398 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 139 (Law Div.1980)). The motion judge correctly concluded that Potter failed to meet his burden and properly denied his request.

vi.

***15** Potter argues that the indictment should have been dismissed because it was based on hearsay evidence, the indictment number was incorrectly transcribed, and he was improperly denied his right to review the grand jury selection process. The motion judge correctly rejected those contentions.

A grand jury indictment is presumed valid and should only be disturbed if manifestly deficient or palpably defective, *Ramseur, supra,* 106 *N.J.* at 232, based on the 'clearest and plainest ground,' *State v. Perry,* 124 *N.J.* 128, 168 (1991) (quoting *State v. N.J. Trade Waste Ass'n,* 96 *N.J.* 8, 18–19 (1984)).[A]n indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error. *State v. Hogan,* 336 *N.J.Super.* 319, 344 (App.Div.), *certif. denied,* 167 *N.J.* 635 (2001). A discrepancy in a date stamp or other similar clerical error will not invalidate an indictment. *State v. Unsworth,* 85 *N.J.L.* 237, 238 (E.A.1913). As we explained in *State v. Holsten,* '[a]n indictment may be based largely or wholly on hearsay and other evidence which may not be legally competent or admissible at the plenary trial.' 223 *N.J.Super.* 578, 585 (App.Div.1988) (alteration in original) (quoting *State v. Schmidt,* 213 *N.J.Super.* 576, 584 (App.Div.1986), *rev'd on other grounds,* 110 *N.J.* 258 (1988)); *see also State v. McCrary,* 97 *N.J.* 132, 146 (1984) (stating that hearsay and other informal proofs are permissible in determining issues that implicate important rights, such as the bases for an indictment (citing *Costello v. United States,* 350 *U.S.* 359, 363, 76 *S.Ct.* 406, 408, 100 *L. Ed.* 397, 402–03, *reh'g denied,* 351 *U.S.* 904, 76 *S.Ct.* 692, 100 *L. Ed.* 1440 (1956))); *State v. Vasky,* 218 *N.J.Super.* 487, 491 (App.Div.1987) (A grand jury may return an indictment based largely or wholly on hearsay testimony.). Where there is sufficient evidence to sustain the grand jury's charges, the indictment should not be dismissed. *See Holsten, supra,* 223 *N .J.Super.* at 585–86.

III.

For all of the reasons stated above, we affirm the conviction and sentence on appeal.

Affirmed.

All Citations

Not Reported in A.3d, 2015 WL 3843309

Footnotes

1 The basketball courts are within 1000 feet of the Asbury Park Middle School.

2 Warraich testified that heroin is usually packaged in glassine paper, which is similar to wax paper, and marked with a stamp. They could be kept individually or in a bundle, consisting of ten bags, or in a brick, consisting of fifty bags. In a bundle, the ten bags are usually held together by a rubber band. A brick consists of five bundles wrapped in newspaper or magazine paper and shaped in a rectangle. A brick is the shape of a masonry brick, but much smaller, about three to four inches long and a little less wide.

3 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

4 Prior to the start of testimony, the judge considered and granted Potter's application to redact portions of the interview video and the related transcript.

5 Potter improperly submits documents that were not before the motion judge when she considered his request for the records. We decline to consider those documents because they are not properly before us. *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N.J.* 436, 452 (2007) (citing *R.* 2:5–5(b) and *R.* 2:9–1(a)).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Terrel F. GOLDSMITH, a/k/a Goldsmith Fuquan, Terrell Goldsmith, Fuquan Hardwick, Shareef Hatten, Terrell Hatten, Raheem Jones, Fuquan Smith, Barry Bell, Raheem Floyd, Ron Frence, Jamar Lewis, Safee Mitchell, Tyrone Parks, and June Wells, Defendant–Appellant.

A-2496-11T1
|
Submitted Sept. 11, 2013.
|
Decided Oct. 7, 2013.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 09–09–2470.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Jack L. Weinberg, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Brian Pollock, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges GRALL, WAUGH, and NUGENT.

Opinion

PER CURIAM.

***1** Defendant Terrel F. Goldsmith appeals his conviction for third-degree possession of a controlled dangerous substance (CDS), *N.J.S.A.* 2C:35–10(a)(1), and third-degree possession with intent to distribute CDS, *N.J.S.A.* 2C:35–5(a)(1), as well as the resulting sentence of incarceration for seven years with a three-and-a-half-year period of parole ineligibility. We reverse.

I.

We discern the following facts and procedural history from the record on appeal.

Newark Police Detectives Henry Suarez and Philip Turzani, both assigned to the narcotics unit, testified that they were dispatched to the area of South 16th Street in response to citizen complaints about drug dealing in the area on July 1, 2009. The detectives were dressed in plain clothes and were driving an unmarked police car. They arrived at the area around 12:45 a.m.

The detectives observed a green Audi parked on South 16th Street. They were approximately seventy feet from the Audi. Suarez testified at the suppression hearing that they had an unobstructed view, and that the street was illuminated by the streetlights and adjacent house lights.

According to the detectives, a black male was in the driver's seat and a female was in the front passenger's seat. Both detectives identified Goldsmith as the driver of the Audi and co-defendant Latoya Paige as the passenger.

The detectives testified that they observed Goldsmith waving at people to come over to his car. A black male, dressed in dark clothing, approached Goldsmith and engaged in a brief conversation, after which Goldsmith reached into the vehicle, retrieved something, and handed it to the man. The unknown male then walked past the officers in their unmarked police vehicle. They observed a second black male approach the passenger side of the Audi. At the suppression hearing, Suarez testified the second black male was wearing a white shirt and blue jeans. He engaged in a similarly brief conversation with Paige, obtained something from Paige in return for some paper currency, and left the area.

As the detectives started to exit their vehicle to approach the Audi, Goldsmith pulled away from his parking spot and drove in a southerly direction. Suarez made a U-turn, followed the Audi, and stopped Goldsmith several blocks later. As Suarez pulled alongside the Audi, Turzani displayed his badge and directed Goldsmith to park the Audi. Goldsmith complied.

Suarez approached the vehicle on the driver's side with his flashlight in hand, while Turzani approached the vehicle on the passenger's side. Suarez asked for Goldsmith's license,

registration, and insurance card. According to Suarez, as Goldsmith reached for his documents in his back pocket, he observed the handle of a gun in Goldsmith's waistband. Suarez testified that he notified Turzani of the presence of the weapon using police code. He then ordered Goldsmith to show his hands by putting them out the window.

Suarez directed Goldsmith to step out of the vehicle, after which he handcuffed him and, according to Suarez, retrieved the gun from his waistband. Turzani ordered Paige out of the vehicle and placed her under arrest. Turzani estimated that the arrests occurred approximately fifteen minutes after he and Suarez observed the two transactions described above.

***2** According to Turzani, he observed a napkin containing white material, which he believed to be cocaine, in the middle of the car's console. Both detectives testified that they observed seventy baggies of cocaine in the car.

In September, Goldsmith and Paige were indicted for the following offenses: second-degree conspiracy to commit the crime of possession of CDS, *N.J.S.A.* 2C:5–2 (count one); third-degree possession of CDS, *N.J.S.A.* 2C:35–10(a)(1) (count two); third-degree possession of CDS with the intent to distribute, *N.J.S.A.* 2C:35–5(a)(1), b(3) (count three); third-degree possession of CDS with the intent to distribute within a school zone, *N.J.S.A.* 2C:35–7 (count four); and second-degree possession of CDS with the intent to distribute within 500 feet of a public housing, contrary to *N.J.S.A.* 2C:35–7.1 (count five).

The indictment also charged Goldsmith with second-degree unlawful possession of a handgun without a permit to carry, *N.J.S.A.* 2C:39–5(b) (count six); third-degree receiving stolen property, a Glock 21 semi-automatic handgun, *N.J.S.A.* 2C:20–7 (count seven); second-degree possession of a weapon while committing a violation of *N.J.S.A.* 2C:35–5 and 2C:35–7, *N.J.S.A.* 2C:39–4.1 (count eight); fourth-degree unlawful possession of hollow point bullets, *N.J.S.A.* 2C:39–3(f) (count nine); and fourth-degree possession of a large capacity ammunition magazine, *N.J.S.A.* 2C:39–3(j) (count ten).

Goldsmith filed a motion to suppress the evidence. On July 22, 2010, the motion judge held an evidentiary hearing and denied Goldsmith's motion. In January 2011, a different judge heard and denied Goldsmith's motion for discovery concerning Turzani's personnel file.

Goldsmith's first jury trial took place later in January. The trial judge held a *Sands/Brunson* [1] hearing and barred use of Goldsmith's 1997 conviction for resisting arrest as too remote for impeachment purposes. However, the judge found that his 1999 conviction for possession of CDS with the intent to distribute within 1000 feet of a school could be used for impeachment purposes, provided it was "sanitized."

On January 25, the jury found Goldsmith not guilty of counts one (second-degree conspiracy to possess), four (third-degree possession of CDS with intent to distribute in a school zone), five (second-degree possession of CDS with intent to distribute near public housing), and nine (fourth-degree unlawful possession of hollow point bullets). The jury was unable to reach a verdict on the remaining charges. On the State's motion, the judge dismissed count seven (third-degree receiving stolen property) and ten (fourth-degree possession of a large capacity ammunition magazine).

Goldsmith was retried on counts two, three, six, and eight, during August and September of 2011. Both detectives testified at trial that they had witnessed an illegal hand-to-hand transaction. Turzani also testified that thirty-one dollars was confiscated from Goldsmith. The detectives explained that the denominations of money found on Goldsmith were commonly used during drug transactions. Turzani opined that bags of cocaine usually sold from two to five dollars each. Suarez opined that the cocaine bags were sold from seven to ten dollars each.

***3** Goldsmith testified on his own behalf. He explained that he was on his first date with Paige on the night of the arrest. He and Paige went to see a movie at approximately 9:15 p.m., but left early to spend time at his home. According to Goldsmith, they left his home before midnight to take Paige home.

Goldsmith testified that they were ordered to pull over by detectives in a gray car at 11th Street and Avon. Suarez initially asked for his driving credentials, after which Turzani told him and Paige to exit the car. Once they were out of the Audi, Turzani began searching it.

When Goldsmith asked why he had been stopped, he was advised not to worry about it and to comply with the officers' requests. Goldsmith testified that, after Turzani stopped searching the car, he sat on the hood of Goldsmith's car and made a telephone call. Turzani then asked Goldsmith and Paige to wait across the street with Suarez. Approximately

fifteen minutes later, a white vehicle stopped and four police officers got out. One of the officers placed him in handcuffs.

Goldsmith testified that he was taken to police headquarters, where he was told that he had been arrested on an existing arrest warrant. According to Goldsmith, he was not told he had been arrested for possession of a gun or drugs. Goldsmith testified that other police officers came to talk to him approximately thirty minutes after he arrived at police headquarters.

Goldsmith explained that the money confiscated during the arrest was from his job as a messenger. He acknowledged a prior conviction based on a guilty plea, but asserted that he was not guilty of the charges in this case.

On cross-examination, when asked the degree of his prior conviction, Goldsmith responded that it was possession of CDS. When the prosecutor asked him whether it was just a possession, he responded in the affirmative. Following a sidebar conference, the prosecutor asked Goldsmith whether he was convicted of possessing CDS. Goldsmith responded that he could no longer remember the actual charge.

Detective Douglas Marshall of the major crimes unit testified on rebuttal that he and other detectives went to police headquarters to "debrief" Goldsmith on information relating to the weapon. According to Marshall, the major crimes unit is called whenever someone is arrested with an illegal handgun.

The jury returned guilty verdicts on count two (third-degree possession of CDS) and three (third-degree possession of CDS with the intent to distribute). The jury found Goldsmith not guilty on count six (second-degree unlawful possession of a handgun without a permit) and count eight (second-degree possession of a weapon while committing a narcotics offense).

At sentencing in October, the trial judge merged count two into count three and granted the State's motion for sentencing to a mandatory extended-term sentence pursuant to *N.J.S.A.* 2C:43–6(f). He imposed a seven-year term with three-and-a-half years without parole eligibility. This appeal followed.

II.

***4** Goldsmith raises the following issues on appeal:

POINT I: THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED.

POINT II: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR THE COURT TO CONDUCT AN IN CAMERA REVIEW OF DETECTIVE TURZANI'S PERSONNEL FILE IN ORDER TO PERMIT THE DEFENDANT TO PROPERLY IMPEACH HIS CREDIBILITY AS A WITNESS.

POINT III: THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE THE STATE INTRODUCED IMPERMISSIBLE EXPERT OPINION TESTIMONY AND IMPROPER LAY OPINION TESTIMONY WHICH INVADED THE FACT–FINDING PROVINCE OF THE JURY. THE COURT FAILED ITS GATEKEEPER ROLE IN PRECLUDING ADMISSION OF THIS IMPERMISSIBLE TESTIMONY SUA SPONTE. [Not raised below.]

POINT IV: THE STATE DEPRIVED THE DEFENDANT THE RIGHT TO A FAIR TRIAL BY COMMENTING UPON AND INTRODUCING EVIDENCE IN VIOLATION OF HIS FIFTH AMENDMET RIGHT TO REMAIN SILENT AND STATE LAW PRIVILEGE AGAINST SELF–INCRIMINATION. [Not raised below.]

POINT V: THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR WAS ALLOWED TO CROSS–EXAMINE THE DEFENDANT ABOUT THE DETAILS OF HIS PRIOR CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE CDS WHICH WAS THE SAME CRIME FOR WHICH HE WAS ON TRIAL IN VIOLATION OF SUPREME COURT JURISPRUDENCE ON SANITIZATION.

POINT VI: THE JURY'S GUILTY VERDICTS ON THE DRUG OFFENSES ARE BASED ON THE IMPROPERLY ADMITTED UNSANITIZED EVIDENCE. THE JURY'S ACQUITTAL ON THE WEAPONS OFFENSE WAS NOT AN EXERCISE OF LENITY. THE GUILTY VERDICTS BASED ON SUCH IMPROPERLY ADMITTED EVIDENCE CANNOT STAND. [Partially raised below.]

POINT VII: THE PROSECUTOR'S REMARKS AND ACTIONS DURING THE COURSE OF THE TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT

DEPRIVING THE DEFENDANT OF A FAIR TRIAL. [Not raised below.]

POINT VIII: THE COURT IMPOSED AN EXCESSIVE SENTENCE WHICH DID NOT TAKE INTO CONSIDERATION ALL APPROPRIATE CODE SENTENCING GUIDELINES.

A.

We begin our analysis with Goldsmith's arguments concerning pretrial rulings: (1) the denial of his motions to suppress and (2) for discovery concerning Turzani's personnel file.

i.

Goldsmith argues that the motion judge erred in denying his motion to suppress the evidence. He contends that the detectives did not have a lawful basis for the traffic stop and that the judge should not have found Suarez to be a credible witness.

The Supreme Court has explained the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress as follows:

> [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [*State v. Elders,* 386 *N.J.Super.* 208, 228 (App.Div.2006)] (citing *State v. Locurto,* 157 *N.J.* 463, 474 (1999)); *see also State v. Slockbower,* 79 *N.J.* 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the ... investigatory search [was] not based on probable cause"); *State v.. Alvarez,* 238 *N.J.Super.* 560, 562–64 (App.Div.1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing *State v. Johnson,* 42 *N.J.* 146, 164 (1964))).
>
> ***5** An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Johnson, supra,* 42 *N.J.* at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. *Id.* at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *Ibid.*
>
> [*State v. Elders,* 192 *N.J.* 224, 243–44 (2007).] [2]

Our review of the trial judge's legal conclusions is plenary. *State v. Harris,* 181 *N.J.* 391, 420–21 (2004), *cert. denied,* 545 U.S. 1145, 125 S.Ct. 2973, 162 *L. Ed.*2d 898 (2005); *State v. Goodman,* 415 *N.J.Super.* 210, 225 (App.Div.2010), *certif. denied,* 205 *N.J.* 78 (2011).

Under the Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution, "[a] warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Cooke,* 163 *N.J.* 657, 664 (2000) (citing *State v. Alston,* 88 *N.J.* 211, 230 (1981)). The same is true of the warrantless seizure of a person or property. *Terry v. Ohio,* 392 *U.S.* 1, 19–21, 88 *S.Ct.* 1868, 1879–80, 20 *L. Ed.*2d 889, 905–06 (1968) (seizure of a person); *State v. Hempele,* 120 *N.J.* 182, 218–19 (1990) (seizure of property).

The seizure of a person occurs in a police encounter if the facts objectively indicate that "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *State v. Tucker,* 136 *N.J.* 158, 166 (1994) (quoting *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 *L. Ed.*2d 389, 402 (1991)) (internal quotation marks omitted). In applying that test, our courts implement the constitutional guarantee to protect the "reasonable expectations of citizens to be 'secure in their persons, houses, papers and effects.' " *Id.* at 165 (quoting *N.J. Const.* art. I, ¶ 7).

The Supreme Court has defined a field inquiry as "the least intrusive" form of police encounter, occurring when a "police officer approaches a person and asks 'if [the person] is willing to answer some questions.' " *State v. Pineiro,* 181 *N.J.* 13,

20 (2004) (alteration in original) (quoting *State v. Nishina,* 175 *N.J.* 502, 510 (2003)). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.' " *Ibid.* (alteration in original) (quoting *Nishina, supra,* 175 *N.J.* at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.' " *State v. Privott,* 203 *N.J.* 16, 24 (2010) (quoting *State v. Maryland,* 167 *N.J.* 471, 483 (2001)).

***6** In contrast to a field inquiry, an investigatory stop, also known as a *Terry* stop, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. *State v. Stovall,* 170 *N.J.* 346, 355–56 (2002); *see also Terry, supra,* 392 U.S. at 19, 88 S.Ct. at 1878–79, 20 *L. Ed.*2d at 904.

The *Terry* exception to the warrant requirement permits a police officer to detain an individual for a brief period, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *State v. Rodriguez,* 172 *N.J.* 117, 126 (2002) (quoting *Terry, supra,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 *L. Ed.*2d at 906). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." *State v. Davis,* 104 *N.J.* 490, 504 (1986).

In denying the motion to suppress, the motion judge found that Suarez was a credible witness and that, based on his training and experience, he was qualified to conclude that he had witnessed drug transactions involving Goldsmith, Paige, and the two unknown males. The judge further found that the detectives had a sufficient basis for the stop of Goldsmith's Audi. The judge also credited Suarez's testimony that he observed the gun when Goldsmith was reaching for his driving credentials and that the drugs were found in plain view.

Goldsmith argues that the second jury's acquittal with respect to the weapons offenses suggests that it did not find Suarez credible. Whether that is accurate is not relevant to our analysis. The factfinder at the suppression hearing was the motion judge, and he did find Suarez credible. In addition, the standard of proof on a motion to suppress is preponderance of the evidence, as opposed to the standard of proof at trial —beyond a reasonable doubt. *State v. Gibson,* 429 *N.J.Super.* 456, 465 (App.Div.2013).

Giving the factual findings of the motion judge the required deference, *Elders, supra,* 192 *N.J.* at 243–44, we conclude that he did not err in denying the motion to suppress.

ii.

We next address Goldsmith's argument that the judge who decided his application for discovery concerning Turzani's personnel file abused his discretion in refusing to review the documents in camera prior to deciding the motion. We review a trial court's rulings on a defendant's discovery motion for abuse of discretion. *State v. Enright,* 416 *N.J. Super* 391, 404 (App.Div.2010), *certif. denied,* 205 *N.J.* 183 (2011).

As part of a criminal defendant's constitutional right to confrontation, a defendant may attack a prosecution witness's credibility by revealing possible biases, prejudices, or ulterior motives as they relate to the issues in the case. *State v. Harris,* 316 *N.J.Super.* 384, 397 (App.Div.1998). The question of "whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records" against a defendant's right of confrontation. *Id.* at 397–98. The State has a duty to learn of any evidence favorable to the defendant known to others acting on the government's behalf in the case, including the police. *State v. Jones,* 308 *N.J.Super.* 15, 42–43 (App.Div.1998). However, that duty cannot be triggered by mere speculation that a government file may contain exculpatory material. *Ibid.*

***7** The defendant "must advance 'some factual predicate which would make it reasonably likely' " that the records contain some relevant information, and establish that the defendant is not merely engaging in a fishing expedition. *Harris, supra,* 316 *N.J.Super.* at 398 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 139 (Law Div.1980)). Disclosure of police personnel records will be permitted where they may reveal prior bad acts that have particular relevance to the issues at trial. *Ibid.*

The motion judge determined that Goldsmith had presented an inadequate factual basis to support his request that Turzani's records be reviewed in camera. Goldsmith relied primarily on the fact that he had made a complaint against Turzani and that his attorney was aware of two others who

also made some sort of complaint, one involving the theft of funds.

In light of the minimal factual support for Goldsmith's motion, we find no basis to conclude that the judge abused his discretion in denying the motion. [3]

B.

We now turn to Goldsmith's contentions concerning errors during the second trial: (1) the opinion evidence concerning whether there was a drug transaction; (2) the cross-examination concerning his prior criminal conviction despite the pretrial ruling on sanitization of that evidence; and (3) the evidence concerning Goldsmith's interrogation by the major crimes unit.

With respect to evidential rulings, our standard of review is abuse of discretion. "Trial judges are entrusted with broad discretion in making evidence rulings." *State v. Muhammad,* 359 *N.J.Super.* 361, 388 (App.Div.), *certif. denied,* 178 *N.J.* 36 (2003). "A reviewing court should overrule a trial court's evidentiary ruling only where a clear error of judgment is established." *State v. Loftin,* 146 *N.J.* 295, 357 (1996) (citations and internal quotation marks omitted).

Some of the issues raised by Goldsmith were not raised before the trial judge. In those instances, we apply the plain error rule, which requires reversal only if the error was "clearly capable of producing an unjust result." *R.* 2:10–2. The possibility of producing an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *State v. Macon,* 57 *N.J.* 325, 336 (1971).

i.

Goldsmith argues that, even though his trial counsel did not to object to the testimony, the trial judge should have prevented the State from offering opinion evidence by Turzani and Suarez concerning the nature of what they witnessed taking place on July 1, 2009. He relies on the Supreme Court's decision in *State v. Sowell,* 213 *N.J.* 89, 99–100 (2013), in which the Court held that, "[a]s gatekeepers, trial judges must ensure that expert evidence is both needed and appropriate, even if no party objects to the testimony." The State responds that the testimony was appropriate and, in any event, did not amount to plain error.

***8** The following testimony by Turzani is at issue:

> Q. Now, officer, how long ... had you been investigating, um, street-level narcotics transactions?
>
> A. A total of ... approximately 12–and–a–half years.
>
> Q. And can you approximate for the jury how many actual drug transactions you've observed?
>
> A. Thousands. Of street-level hand-to-hand narcotic activity, thousands.
>
> Q. And how many times have you come into contact with illegal drugs?
>
> A. Numerous—thousands, thousands of cases.
>
> Q. And how many arrests at that point had you made for illegal drug transactions, illegal street-level drug transactions?
>
> A. The same, thousands[.]
>
> ....
>
> Q. —had you received training with respect to identifying the characteristics of a street-level drug transaction?
>
> A. Yes.
>
> Q. In your training and experience, what did you think you observed that day?
>
> A. I observed a narcotic ... transaction.
>
> Q. And the size of the object that was handed by Mr. Goldsmith to the unidentified individual, was that consistent with, um crack cocaine, a bag of crack cocaine?
>
> A. Yes.
>
> Q. And what you saw being handed back to Mr. Goldsmith in return, was that consistent with a bill?
>
> A. Yes.
>
> ....
>
> Q. Now, you're an experienced narcotics officer. You testified earlier that you've observed thousands of drug

transactions ... been part of almost as many arrests. Those denominations—three $5 bills and 16 singles, $1 bills ... does that have any significance .... to you as [an] experienced narcotics officer?

A. Yes, it would designate that he's selling narcotics.

Q. How? What does that mean?

A. Most ... drug addicts that walk up to people that are buying them ... they're usually $5 bags or maybe even less. Sometimes $2 to $5 they charge them....

....

Q. Um, your training and experience ... those bags are worth between $2 and $5?

A. That's what they sell it for on the street, yes.

....

Q. Were the drugs field-tested?

A. Yes, by Detective Webber.

....

Q. The field test confirms that at least one of the bags was, indeed, crack cocaine?

A. Yes.

Goldsmith also objects to the following testimony by Suarez:

Q. Now ... at this point, how long had you been a narcotics detective?

A. Four-and-a-half years.

Q. Now, how many narcotics investigations had you been a part of at this point in your career?

A. At that point, I was part of hundreds of narcotic investigations.

Q. Now, had you actually observed hand-to-hand illegal drug transactions on the street?

A. Yes, I have.

Q. Approximately how many have you observed?

A. Hundreds of transactions.

Q. Now, when you witnessed this activity at the driver's side window of the Audi, what did you think?

A. Well, I—we, myself and my partner, we definitely thought that a crime was going to be committed, something was going to happen. The driver of the vehicle was calling people over for a reason.

***9** Q. Now, what did you actually observe take place between the man—the unidentified man wearing all black walking to the driver's side of the vehicle—and the man sitting in the driver's seat of the vehicle?

A. Well, at that time, ... they engaged in[ ] a brief conversation. And then I observed the driver of the vehicle, the guy was sitting on the driver's seat, he reach[ed] for something in the middle of the vehicle, hand[ed] it to the person that was standing outside his vehicle, the person dressed all in black, hand[ed] him an object. And then this person hand[ed] some paper currency to the driver.

Q. Now, the object that you saw the driver hand the other individual, can you describe the size?

A. No, I couldn't. It was—we were too far.

....

Q. Now, with your training and experience as a narcotics detective, did you not believe you just witnessed a drug transaction, an illegal drug transaction?

A. Yes, we did.

We agree with Goldsmith that the testimony at issue should have been excluded by the trial judge, even in the absence of an objection. Both officers gave opinion testimony based on their alleged expertise in narcotics investigation without having been qualified as experts pursuant to *N.J.R.E.* 702. More importantly, they both testified, again based on their expertise, that they had witnessed Goldsmith and Paige engage in drug transactions, which was an issue to be determined by the jury. *Sowell, supra,* 213 *N.J.* at 99–102; *State v. McLean,* 205 *N.J.* 438, 460–63 (2011); *State v. Odom,* 116 *N.J.* 65, 77 (1989).

A qualified police officer can testify at trial in the form of opinion concerning issues such as whether certain quantities or packaging of narcotics is indicative of possession for personal use or for distribution. *Odom, supra,* 116 *N.J.* at 76–82. That portion of the detectives' testimony would have been

admissible had it been presented following their qualification as experts.

However, the detectives should not have been permitted to testify that they witnessed drug transactions. The jury was capable of making that determination based on the nature of (1) the conduct testified to by the detectives and (2) the drugs and currency found at the time of the arrest, about which there could have been expert testimony had the witnesses been properly qualified. *Sowell, supra,* 213 *N.J.* at 100–02.

Although the defense presented at trial was that Goldsmith was not even at the location where the purported drug transaction took place, the jury was not required to credit that part of the defense case. That being the case, the testimony of two police "experts" that the transactions they witnessed were drug purchases was "clearly capable of producing an unjust result," such that there is "a reasonable doubt" as to whether the jury would have reached the same result without the improper opinion testimony.

Consequently, the convictions must be reversed.

ii.

***10** We now turn to the issue of whether the trial judge erred in permitting the prosecutor to cross-examine Goldsmith on the nature of his prior conviction.

N.J.R.E. 609 permits the use of prior convictions for impeachment purposes "unless excluded by the judge as remote or for other causes." Goldsmith had two prior convictions. One was excluded as remote. The other, more recent conviction was for an offense similar to the distribution offense for which he was being tried. Under those circumstances, "the prosecution [is permitted to] 'introduce evidence of the defendant's prior conviction limited to the degree of the crime and the date of the offense but excluding any evidence of the specific crime of which defendant was convicted.' " *State v. Harris,* 209 *N.J.* 431, 441–42 (2012), *cert. denied,* 532 *U.S.* 1057, 121 *S.Ct.* 2204, 149 *L. Ed.*2d 1034 (2001) (quoting *Brunson, supra,* 132 *N.J* . at 391). If, however, a defendant testifies falsely about a prior conviction, further questioning concerning the nature of the conviction may be permissible. *See State v. Buffa,* 51 *N.J.Super.* 218, 227 (App.Div.1958), *aff'd,* 31 *N.J.* 378, *cert. denied,* 364 *U.S.* 916, 81 *S.Ct.* 279, 5 *L. Ed.*2d 228 (1960).

The following testimony took place during Goldsmith's cross-examination:

> Q. Now you told the jury earlier with respect to your conviction in 1999, um, ...
>
> A. Ninety-six.
>
> Q. Nineteen-ninety-six?
>
> A. I pleaded guilty in '99 though. The charge was in '96, I pleaded guilty in '99.
>
> ....
>
> Q. *It was a third-degree offense right?*
>
> A. *Possessing C.D.S.*
>
> Q. And you were sentenced to ...
>
> A. Three with a one.
>
> Q. *It was just possession of C.D.S.?*
>
> A. *Yes.*
>
> [(Emphasis added).]

The prosecutor's initial question concerning the degree of the offense was proper under *Harris* and *Brunson.* Had Goldsmith simply answered in the affirmative, the prosecutor would not have been allowed to go into the nature of the offense. However, Goldsmith's answer was not responsive to the question about the degree of his prior conviction. While the answer was accurate as far as it went, it was incomplete because the prior offense involved possession with intent to distribute and not mere possession.

Rather than insisting on an answer to the question he had asked, the degree of the prior offense, the prosecutor asked Goldsmith whether it was "just possession." The prosecutor knew that it was not, yet he invited Goldsmith to testify that it was.

It was only after Goldsmith answered in the affirmative, thereby giving an inaccurate rather than an incomplete answer, that the prosecutor asked for a conference at sidebar. He then argued that Goldsmith's second answer, the one he had invited, had "opened the door" to questions about the nature of the offense. After the trial judge learned the actual nature of Goldsmith's prior conviction, the colloquy at sidebar then continued:

***11** [DEFENSE COUNSEL:] At a minimum the jury now knows at the time he's looking. He's the one that baited defendant—

[PROSECUTOR:] I didn't bait him.

[DEFENSE COUNSEL:] —and deliberately asked him what he was arrested for....

....

[THE COURT:] He said he didn't ask him that.

[PROSECUTOR:] I said you pleaded ... to a third-degree crime.

[THE COURT:] That's exactly what he said. And then your guy popped it out of his mouth unresponsively.

[DEFENSE COUNSEL:] No problem, Judge. I'll correct it.

....

[DEFENSE COUNSEL:] [T]hat's what he recalls

[PROSECUTOR:] Well, it's a half truth.

[DEFENSE COUNSEL:] *So, you do it.* That's what he recalls.

[PROSECUTOR:] Yeah.

[DEFENSE COUNSEL:] I don't have a problem with it. Let's go.

[THE COURT:] Alright. He doesn't have a problem with it. He opened the door, you can cross-examine on it.

[(Emphasis added).]

The prosecutor then continued his cross-examination:

Q. Now, isn't it true, ... that you pled guilty to possession of CDS with intent to distribute within 1,000 feet ... of a school? Isn't that what you pled guilty to?

A. I don't remember.

Prosecutors have a duty to refrain from employing "improper methods calculated to produce a wrongful conviction." *State v. Wakefield,* 190 *N.J.* 397, 436 (2007), *cert. denied,* 552 *U .S.* 1146, 128 *S.Ct.* 1074, 169 *L. Ed.*2d 817 (2008) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 *S.Ct.* 629, 633, 79 *L. Ed.* 1314, 1321 (1935)). Thus, prosecutors must "refrain from any conduct lacking in the essentials of fair play, and where [ ] conduct has crossed the line and resulted in foul play, the reversal of the judgment below will be ordered." Wakefield, *supra,* 190 *N.J.* at 437 (quoting *State v. Siciliano,* 21 *N.J.* 249, 262 (1956)). "[T]o justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of [her] defense." *Id.* at 438 (quoting *State v. Papasavvas,* 163 *N .J.* 565, 625 (2000)).

Given the highly prejudicial nature of the prior conviction, the prosecutor should have asked for the conference before he asked the follow-up question. Instead, he asked a leading question based on a premise he knew to be inaccurate. That caused Goldsmith to turn his earlier incomplete answer into an inaccurate one, but only by agreeing to the prosecutor's erroneously premised question. In doing so, the prosecutor precluded the possibility of returning the focus of the interrogation to the degree of the offense without getting into the highly prejudicial details of the offense. The prosecutor knew that the nature of the conviction was to be sanitized, yet he did not ask for the judge's guidance until after he had set the hook with his second question. It was the prosecutor who was primarily responsible for inducing Goldsmith to "open the door" by asserting that it was "just" possession.

***12** Admittedly, defense counsel further complicated matters by telling the judge that he "would deal with it." Nevertheless, the trial judge should have precluded any further examination on the issue based on the prosecutor's role in exacerbating the problem. Had the judge limited the prosecutor to insisting on an answer to his question about the charge of the offense, the jury would not have known that the prior conviction involved distribution, and Goldsmith would have had to live with his mistake in bringing up the fact that his prior conviction was for a drug offense.

The significant likelihood of prejudice resulting from the testimony that his prior conviction was for *distribution* is illustrated by the fact that the jury convicted him of the drug offenses but acquitted him of the weapons offenses. We conclude that the disclosure of the full nature of Goldsmith's prior conviction is a second basis for reversal.

iii.

Because we remand for retrial, we briefly mention Goldsmith's argument that his Fifth Amendment right to remain silent was infringed when the State offered testimony concerning the major crimes unit's protocol on the interrogation of defendants in cases involving weapons. We find the argument to be without merit and not warranting extended discussion in a written opinion. *R.* 2:11–3(e)(2). There was no testimony that Goldsmith refused to cooperate or that he invoked his right to remain silent. We find no error, and certainly no plain error "clearly capable of producing an unjust result." *R.* 2:10–2.

C.

In light of our decision to reverse on the basis of the opinion testimony by the police officers and the introduction of the nature of Goldsmith's prior conviction, we need not reach the remaining arguments raised on appeal.

III.

Reversed and remanded.

All Citations

Not Reported in A.3d, 2013 WL 5507742

Footnotes

1 *State v. Brunson,* 132 *N.J.* 377 (1993); *State v. Sands,* 76 *N.J.* 127 (1978).

2 *State v. Diaz–Bridges,* 208 *N.J.* 544, 565–66 (2011), outlines a different standard for cases involving videos of police interrogations. Because there were no videos in this case, that standard is not applicable.

3 Our holding does not preclude Goldsmith from seeking such discovery in connection with any retrial, if an appropriate factual basis is available and presented to the trial judge.

2010 WL 3075470
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Marco CERRONE, Defendant-Appellant.

Submitted Nov. 4, 2009.
|
Decided Aug. 4, 2010.

West KeySummary

1 **Witnesses** Extent of Showing; Number of Offenses

Trial court did not abuse their discretion in determining the state could use three prior convictions to impeach defendant if he testified. Second-degree aggravated sexual assault was a serious offense and defendant's criminal record from that conviction forward, which included two more indictable convictions, evidenced his contempt for the bounds of behavior placed on all citizens. Additionally, defendant had an intervening municipal court conviction for disorderly conduct, which was considered in determining whether defendant's prior convictions were too remote for impeachment purposes.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 07-01-0064.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the brief).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Joseph H. Enos, Jr., Assistant Prosecutor, on the brief).

Before Judges GILROY and SIMONELLI.

Opinion

PER CURIAM.

***1** A Gloucester County Grand Jury charged defendant with third-degree possession of a controlled dangerous substance (CDS) (cocaine), *N.J.S.A.* 2C:35-10a(1) (count one); third-degree resisting arrest, *N.J.S.A.* 2C:29-2 (count two); and fourth-degree obstruction of justice, *N.J.S.A.* 2C:29-1a. [1] On December 14, 2007, the trial court conducted an evidentiary hearing on defendant's motions to suppress evidence and to suppress statements he had given to the police after his arrest. The court denied the motions on February 8, 2008, and the matter proceeded to trial on May 7 and 8, 2008. At the close of the State's case, defendant moved for judgment of acquittal. *R.* 3:18-1. The court granted the motion as to count two only. Following the dismissal of count two, the jury found defendant guilty of count three and not guilty on count one.

On July 3, 2008, the court sentenced defendant on count three to a four-year period of probation, and to 150 hours of community service. The court also imposed all appropriate fines and penalties, and dismissed the three traffic summonses at the request of the State.

On appeal, defendant argues:

POINT I.

THE TRIAL COURT ERRED IN PRECLUDING DEFENDANT FROM ACCESSING RECORDS REGARDING THE ARRESTING OFFICER.

POINT II.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIS CAR.

POINT III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE STATEMENTS HE MADE TO POLICE.

POINT IV.

THE TRIAL COURT ERRED IN RULING DEFENDANT'S PRIOR CONVICTIONS ADMISSIBLE AGAINST HIM AT TRIAL.

POINT V.

THE COMMENTS BY THE PROSECUTOR DURING SUMMATION WERE PREJUDICIAL AND DENIED DEFENDANT A FAIR TRIAL.

POINT VI.

DEFENDANT'S SENTENCE IS EXCESSIVE AND IMPROPER.

We affirm.

I.

We derive the following facts from the testimony of Patrolman Michael Shomo, the only witness who testified at trial. Early in the morning of September 17, 2007, Shomo stopped a motor vehicle operated by defendant, after observing a non-illuminated rear license plate and a large object hanging from the vehicle's rear view mirror. Shomo approached the vehicle and requested defendant to place the vehicle into park, turn off the vehicle's engine and lights, and produce his driving credentials. Although initially hesitant to follow the officer's instructions, defendant complied.

In viewing defendant's driving credentials with the assistance of his flashlight, Shomo observed what he believed was drug paraphernalia laying on the front passenger's lap and on the front floorboard, both on the passenger's and driver's side of the vehicle. Shomo instructed defendant to step out of the vehicle and not to place his hands into his pockets. Defendant stepped out of the vehicle and started walking toward its rear when he stopped, angled his body away from Shomo, and placed his right hand into his pant's pocket. Upon observing defendant's movements, Shomo instructed defendant to place his hands on his vehicle for the purpose of performing a pat down search.

***2** As Shomo started the pat down search, defendant pushed his hip against his vehicle, preventing the officer from completing the search. After defendant removed his hands from his vehicle, Shomo instructed him to place them back on the vehicle, informing him that if he removed his hands from the vehicle again, he would be arrested for obstruction of administration of justice. When defendant removed his hands from the vehicle a second time, Shomo placed him under arrest. While attempting to handcuff defendant, defendant failed to comply with the officer's instructions. Shomo and defendant slid alongside the vehicle toward its front, where defendant fell onto the driver's seat, yelling to the passenger.

Shomo removed defendant from the vehicle and attempted to search him incident to the arrest. Because defendant continued to act in an uncooperative manner, Shomo was not successful. Shomo walked defendant toward his patrol vehicle, and as they neared the patrol vehicle, defendant suddenly threw himself onto the vehicle's front hood. As Shomo continued to walk defendant toward the rear of the patrol vehicle, defendant "just let his muscles give [way]" and fell to the ground.

When Shomo attempted to help defendant off the ground, the unidentified front seat passenger exited defendant's motor vehicle. Shomo instructed the passenger to return to the vehicle. When the passenger refused, Shomo knelt on top of defendant, un-holstered his service weapon, and pointed it toward the passenger. The passenger started to get back into defendant's vehicle, but then fled the scene. Once the passenger left, Shomo assisted defendant off the ground, and placed him into the rear of the patrol vehicle.

A short time later, a second police officer arrived. The two officers attempted to remove defendant from the rear of the patrol vehicle to search him. On defendant's failure to comply with the officers' requests, Shomo sprayed defendant with a burst of Capstun and shut the vehicle's doors. When a third police officer arrived at the scene, the second police officer started a K-9 search for the passenger.

Shomo and the third officer again attempted to remove defendant from the patrol vehicle to search him. As Shomo opened the passenger door, he observed "four clear orange plastic baggies" lying on the rear floorboard of the vehicle. Although Shomo could not explain how defendant accomplished it, he testified that defendant had removed his pants and shoes. On completing the search and securing defendant in the rear of his patrol vehicle, Shomo transported defendant to police headquarters. While processing defendant, and before Shomo gave defendant his *Miranda*[2] warnings, defendant blurted out that "I go nuts around the police." Shomo asked him why, and defendant

responded, "because my old lady tried to stick it to me." Shomo acknowledged that defendant never threatened him with physical violence, but only acted in an uncooperative manner the entire time of the motor vehicle stop.

***3** We have considered the arguments raised in Points II, III, V and VI of defendant's brief, and conclude that none of those arguments are of sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). Accordingly, we turn to defendant's remaining arguments.

II.

Defendant argues in Point I of his brief that the trial court erroneously denied his pre-trial discovery request seeking police department records regarding Shomo's arrest history and incident reports where the officer may have previously filed resisting arrest or obstruction of administration of justice charges, or issued traffic summonses for violations of *N.J.S.A.* 39:3-66 or 39:3-74, against or to other third parties. Defendant contends that he sought the information to support his defense "that it was Officer Shomo who'd initiated the hostilities with defendant and then subsequently blamed defendant for the situation that developed-molding the facts against defendant to support the State's charges at trial." Defendant asserts that the court's ruling denying him access to the information, "violated his constitutional rights to impeach the State's version of events, confront the witnesses against him, and present a complete defense to the State's charges." We disagree.

On review, we accord deference to a trial court's evidentiary ruling. *State v. R.E.B.,* 385 *N.J.Super.* 72, 82, 895 A.2d 1224 (App.Div.2006). Therefore, we will not reverse a trial court's evidentiary determination "unless the court not only abused its discretion[,] but was also clearly wrong." *Ibid.* Simply stated, "an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.' " *State v. Brown,* 170 *N.J.* 138, 147, 784 A.2d 1244 (2001) (quoting *State v. Marrero,* 148 *N.J.* 469, 484, 691 A.2d 293 (1997)).

A defendant's right to confront witnesses is guaranteed by both Federal and New Jersey Constitutions. *State v. Budis,* 125 *N.J* . 519, 530, 593 A.2d 784 (1991) (citing U.S. Const. amend. VI; *N.J. Const.* art. 1, ¶ 10). "The right to cross-examine is an essential element of that right." *State v. Harvey,* 151 *N.J.* 117, 188, 699 A.2d 596 (1997), *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 *L. Ed* .2d 683 (2000). This right of confrontation affords a defendant the opportunity to question the State's witnesses, protects against improper restrictions on the questions asked during cross-examination, and affords the accused the right to elicit favorable testimony on cross-examination. *Budis, supra,* 125 *N .J.* at 530-31, 593 A.2d 784. "Cross-examination is the principal means by which a witness' credibility is tested." *State v. Harris,* 316 *N.J.Super.* 384, 397, 720 A.2d 425 (App.Div.1998). "A [witness'] credibility may be attacked by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate to issues in the case at bar." *Ibid.*

***4** Nonetheless, the right to confront witnesses "does not require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ibid.* A defendant is "not entitled to turn the discovery process into a fishing expedition." *State v. Broom-Smith,* 406 *N.J.Super.* 228, 239, 967 A.2d 359 (App.Div.2009), *aff'd,* 201 *N.J.* 229, 989 A.2d 840 (2010). Nor should a defendant " 'transform the discovery process into an unfocused, haphazard search for evidence.' " *State v. Gilchrist,* 381 *N.J.Super.* 138, 146, 885 A.2d 29 (App.Div.2005) (quoting *State v. D.R.H.,* 127 *N.J.* 249, 256, 604 A.2d 89 (1992)).

"The determination of whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-examination under the Confrontation Clause." *Harris, supra,* 316 *N.J.Super.* at 397-98, 720 A.2d 425. In furtherance of that balancing test, we held that where a defendant seeks to review a police officer's personnel file the defendant "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw .' " *Id.* at 398, 720 A.2d 425 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 141, 425 A.2d 711 (Law Div.1980)). However, it's not required that the defendant first establish that the personnel file "actually contains relevant information." *Ibid.* On establishing a right to inspect the police officer's personnel file, "[t]he disclosure ... should be made to both the defense and the State in chambers and on the record." *Id.* at 387, 720 A.2d 425.

Here, on an unspecified date prior to December 14, 2007, when the court conducted an evidentiary hearing on

defendant's motions to suppress evidence and to suppress defendant's statements, defendant filed a motion seeking an order compelling the State to turn over Shomo's personnel file. At the December 14, 2007 suppression hearing, Shomo testified in accordance with his trial testimony. Although defendant testified at the suppression hearing, he did not testify to events that occurred at the motor vehicle stop. Rather, he confined his testimony to the ownership of the motor vehicle he was operating on the night of the incident, and to the fact that the vehicle subsequently passed inspection without any repairs being made to the rear license plate lights.

On December 27, 2007, defendant served a subpoena *duces tecum* on the Westville Borough's Chief of Police seeking production of the following documents:

1. A copy of the Computer Assisted Dispatch ("CAD") report(s) and/or radio log(s) under Westville Police Department Case # 200608785 involving Police Officer Michael Shomo (# 2110), Police Officer Brian Ewe and any other responding Westville Borough police officers;

2. For the front and back of all traffic summonses issued by Officer Shomo for violations of *N.J.S.A.* 39:3-66 and/or *N.J.S.A.* 39:3-74 and any investigation reports associated with said summonses since he became employed as a Westville Borough police officer approximately four (4) years ago through the present date;

***5** 3. A list of all individuals (including name, address and race) who have been charged in the Westville Borough Municipal Court or Gloucester County Superior Court by Officer Shomo with resisting arrest (*N.J.S.A.* 2C:29-1) and/or obstruction of justice (*N.J.S .A.* 2C:29-2) wherein Officer Shomo claimed to be the victim of such conduct since he became employed as a Westville Borough police officer approximately (4) four years ago through the present date;

4. For any standard Operating Procedures ("SOPs") in effect on or about September 17, 2006 concerning when and under what circumstances an officer can order a driver out of his/her motor vehicle;

5. For any SOP in effect on or about September 17, 2006 concerning when and under what circumstances an officer can use a chemical agent (such as "cap stun") on a citizen;

6. The quarterly reviews of Officer Shomo; and

7. Any and all documents concerning any internal affairs investigations of Officer Shomo (including any and all allegations of excessive force against him).

On the same day, defendant also served a subpoena *duces tecum* on the Westville Borough Municipal Court Administrator seeking the same items referenced in paragraphs 2 and 3 above, together with copies of "any private citizen complaints filed against Officer Shomo since he became employed as a Westville Borough police officer approximately four (4) years ago through the present date."

On January 8, 2008, the State filed a motion seeking to quash the two subpoenas. [3] On February 4, 2008, the court issued a written decision addressing defendant's motion seeking to inspect Shomo's personnel file and the State's motion to quash the subpoenas. Acknowledging that defendant asserted self-defense to the charge of resisting arrest, the court determined that defendant had shown a sufficient factual predicate to require Shomo's personnel file be inspected by the court *in camera,* after which the court would advise what documents, if any, should be disclosed to defendant. As to the two subpoenas, the court directed that the State produce documents referenced in paragraphs 1, 4, and 5 in the list attached to the subpoena served on the Chief of Police. The court granted the State's motion to quash the requests regarding documents contained in paragraphs 3, 6, and 7, "as those requests will be considered when the [c]ourt reviews the personnel record of the [o]fficer." The court also quashed the remaining document requests, determining that "the relevance of the evidence to this case [was] so attenuated that its probative value is slight."

Following the court's decision, the State presented Shomo's personnel file to the court and turned over certain other documents to defendant as directed by the court. On February 8, 2008, the court, after reviewing the personnel file with counsel in chambers, but not on the record, determined that the file did not contain any information relevant to the charges pending against defendant. It is against this record that defendant contends the trial court improperly granted the State's motion quashing the subpoenas as to certain documents he sought to obtain from the Westville Borough Chief of Police and Municipal Court Administrator. [4]

***6** Because we believe defendant may have improperly sought to obtain pre-trial discovery by way of the subpoenas *duces tecum,* rather than by filing a motion seeking an order

compelling the production of the documents, we treat the issue presented as if it had first come before the trial court on motion of defendant. In addressing defendant's argument, we acknowledge that some of the documents defendant sought by the subpoenas may be found outside of Shomo's personnel file, for example, copies of any complaints in the municipal court that may have been filed by or against Shomo. In such a case, defendant may have been entitled to receive copies of those complaints pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1 to -13. *See* Pressler, *Current N.J. Court Rules,* comment 7 on *R.* 1:9-2 (2010) ("Where public records are sought to be inspected for purposes of discovery rather than for introduction at trial, the proper procedural technique is an action pursuant to [The Open Public Records Act,] rather than the issuance of a subpoena duces tecum under this Rule").

However, when a defendant seeks to compel the State to produce documents, which are of the same type generally found in a police officer's personnel file, we conclude that the court should view the request through the lens of *Harris,* requiring the defendant to proffer a factual predicate that would make it "reasonably likely that the [documents] will bear such fruit and that the quest for [their] contents is not merely a desperate grasping at a straw." 316 *N.J.Super.* at 398, 720 A.2d 425 (internal quote and citation omitted). This is not such a case.

In *Harris,* we directed that the State turn over the arresting officer's personnel file for an *in camera* review, following leave to appeal from a post-judgment of conviction motion. The defendant had presented evidence that the arresting officer had taken money from him and his friends, had planted drugs on them, and had harassed them on other occasions prior to the incident leading to the arrest, *Harris, supra,* 316 *N.J.Super.* at 391, 720 A.2d 425; that the arresting officer was a drug user, *id.* at 399, 720 A.2d 425; that the arresting officer had been suspended from the police department, *id.* at 394, 720 A.2d 425; and a newspaper had reported that the police department was investigating the arresting officer for alleged shakedowns of other individuals. *Ibid.* Because we determined that the defendant had produced evidence of a factual predicate that would make it reasonably likely that information in the personnel file could affect the officer's credibility, we directed that the personnel file be turned over for an *in camera* review. *Id.* at 399, 720 A.2d 425.

Here, just the opposite is so. The record is devoid of any evidence that Shomo acted in an unlawful or in an inappropriate manner toward defendant or toward any other third parties. Shomo was subjected to an extensive and probing cross-examination during the suppression hearing, and yet a review of the transcript fails to disclose any improper conduct on his part during the motor vehicle stop. Defendant testified at the suppression hearing, but did not testify to any facts challenging Shomo's version of the events leading to the criminal charges. Although a criminal defendant is entitled to broad discovery, he or she "cannot transform the discovery process into an unfocused, haphazard search for evidence." *D.R.H., supra,* 127 *N.J.* at 256, 604 A.2d 89. Accordingly, applying our deferential standard of review of a trial court's evidentiary ruling, we find no abuse of discretion in the trial court's grant of the State's motion to quash defendant's discovery requests.

III.

***7** Defendant argues in Point IV of his brief that the trial court erred in determining that the State could use his 1991, 1998 and 1999 criminal convictions for purpose of impeachment. Defendant asserts that the prior convictions were too remote from the trial to be probative as to his credibility. He contends the trial court failed to balance the remoteness of the convictions against the nature of the crimes underlying the convictions to assess whether the relevancy of the evidence as to his credibility outweighed any prejudice to him. Defendant asserts that the court's erroneous ruling denied him his constitutional right to testify at trial. We disagree.

N.J.R.E. 609 provides in relevant part that "[f]or the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes." The party seeking to bar the admission of prior-conviction evidence bears the "burden of proof to justify [its] exclusion." *State v. Sands,* 76 *N.J.* 127, 144, 386 A.2d 378 (1978). The decision whether to admit such evidence "rests within the sound discretion of the trial judge." *Ibid.* Accordingly, we will not disturb a trial judge's decision to admit prior-conviction evidence unless we find a clear abuse of discretion. *Brown, supra,* 170 *N.J.* at 147, 784 A.2d 1244; *State v. Hutson,* 211 *N.J.Super.* 49, 53, 510 A.2d 706 (App.Div.1986), *aff'd,* 107 *N.J.* 222, 526 A.2d 687 (1987).

A trial court may exclude prior-conviction evidence "when the evidence's 'probative force because of its remoteness, giving due consideration to relevant circumstances such as

the nature of the crime, and intervening incarcerations and convictions, is substantially outweighed so that its admission will create undue prejudice.' " *State v. Hamilton,* 193 *N.J.* 255, 263-64, 937 A.2d 965 (2008) (quoting *Sands, supra,* 76 *N.J.* at 147, 386 A.2d 378). Thus, the key to admitting prior-conviction evidence is its remoteness. *Sands, supra,* 76 *N.J.* at 144, 386 A.2d 378. However,

> [r]emoteness cannot ordinarily be determined by the passage of time alone. The nature of the convictions will probably be a significant factor. Serious crimes, including those involving lack of veracity, dishonesty or fraud, should be considered as having a weightier effect than, for example, a conviction of death by reckless driving. In other words, a lapse of the same time period might justify exclusion of evidence of one conviction, and not another. The trial court must balance the lapse of time and the nature of the crime to determine whether the relevance with respect to credibility outweighs the prejudicial effect to the defendant. Moreover, it is appropriate for the trial court in exercising its discretion to consider intervening convictions between the past conviction and the crime for which the defendant is being tried. When a defendant has an extensive prior criminal record, indicating that he has contempt for the bounds of behavior placed on all citizens, his burden should be a heavy one in attempting to exclude all such evidence. A jury has the right to weigh whether one who repeatedly refuses to comply with society's rules is more likely to ignore the oath requiring veracity on the witness stand than a law abiding citizen. If a person has been convicted of a series of crimes through the years, then conviction of the earliest crime, although committed many years before, as well as intervening convictions, should be admissible.
>
> ***8** [*Id.* at 144-45, 386 A.2d 378.]

Here, defendant was convicted of second-degree aggravated sexual assault and of two fourth-degree offenses of criminal trespass in 1991; third-degree eluding in 1998; and fourth-degree unlawful possession of a weapon in 1999. Prior to trial, defendant sought to prohibit the State from using these convictions to impeach his credibility should he testify at trial on the basis that the convictions were too remote. The court determined that the convictions were not so remote as to prohibit the State from using them for impeachment purposes. However, because the court was concerned about the eluding conviction being similar to two of the charges against defendant, the court ordered all convictions sanitized, directing that the State could use the convictions on cross-examination but that any reference to them was to be limited to the degree of the crime and the date of the conviction. *See State v. Brunson,* 132 *N.J.* 377, 393, 625 A.2d 1085 (1993).

We discern no abuse of discretion by the trial court in determining that the State could use the three convictions to impeach defendant if he testified. Second-degree aggravated sexual assault is a serious offense. Defendant's criminal record from that conviction forward, which included two more indictable convictions, evidences his "contempt for the bounds of behavior placed on all citizens." *Sands, supra,* 76 *N.J.* at 145, 386 A.2d 378. Moreover, defendant also had an intervening municipal court conviction for disorderly conduct in January 1995. *State v. Irrizary,* 328 *N.J.Super.* 198, 204, 745 A.2d 550 (App.Div.) (holding that "a defendant's municipal court convictions can be considered in determining whether a defendant's prior convictions are too remote for impeachment purposes"), *certif. denied,* 164 *N.J.* 562, 753 A.2d 1154 (2000).

Affirmed.

All Citations

Not Reported in A.2d, 2010 WL 3075470

Footnotes

1 The arresting police officer also issued defendant three traffic summonses for failure to maintain required illuminating devices on his motor vehicle, *N.J.S.A.* 39:3-66; operating a motor vehicle with an obstructed view, *N.J.S.A.* 39:3-74; and possession of a CDS in a motor vehicle, *N.J.S.A.* 39:4-49.1.

2 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

3 We question the appropriateness of defendant seeking discovery via the two subpoenas *duces tecum.* The subpoenas directed the Chief of Police and the Municipal Court Administrator to appear, give testimony, and to "produce at the same time" the aforementioned documents. Contrary to civil procedure, "[t]here is no available deposition technique for general discovery" in criminal proceedings. Pressler, *Current N.J. Court Rules,* comment 1 on *R.* 3:13-2 (2010). Rather

"depositions in criminal actions are limited to the procedures and authorizations" contained in *Rule* 3:13-2. *Ibid.; see also Kaszubinski, supra,* 177 *N.J.Super.* at 141, 425 A.2d 711 (stating that "[t]he purpose of a subpoena *duces tecum* is to obtain the production of documents or other items that will aid in the development of testimony at trial. It is not appropriately employed as a discovery device in criminal proceedings.").

4 Although unclear in defendant's brief, it appears that he is not challenging the trial court's denial of his request for the State to turn over Shomo's personnel file as the court did review the file *in camera* with counsel. Accordingly, we considered defendant's argument limited to the denial of the documents contained in paragraphs 2, 3, 6 and 7 of the subpoena served upon the Chief of Police and in paragraph 3 of the subpoena served upon the Municipal Court Administrator seeking copies of any private citizens' complaints that may have been filed against Shomo.

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STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY, Appellants-Petitioners, v. STATE OF NEW JERSEY, GURBIR S. GREWAL, in his capacity as ATTORNEY GENERAL, COLONEL PATRICK J. CALLAHAN, in his Capacity as SUPERINTENDENT of the DIVISION OF STATE POLICE and THE DIVISION OF STATE POLICE, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-3950-19 CIVIL ACTION On Appeal from: On Appeal from the June 15, 2020 and June 19, 2020 Final Administrative Actions of the Attorney General

BRIEF OF AMICI CURIAE NATIONAL COALITION OF LATINO OFFICERS AND LAW ENFORCEMENT ACTION PARTNERSHIP

Of Counsel and On the Brief:
CJ Griffin, Esq. (031422009)

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, NJ 07601
Ph: (201) 488-8200
F: (201) 488-5556

cgriffin@pashmanstein.com

Counsel for Amici Curiae, National Coalition of Latino Officers and Law Enforcement Action Partnership

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[1] https://bit.ly/3izEGz4

PRELIMINARY STATEMENT

The National Coalition of Latino Officers and the Law Enforcement Action Partnership (hereinafter "Amici") are non-profit organizations comprised primarily of members of the law enforcement community. Amici file this friend-of-the-court brief in opposition to the motions for a stay by the police unions and in support of the Attorney General's (AG) recent directives to disclose the names of officers who have received major discipline.

This Court must understand that not all law enforcement officers agree with the police union's position in this appeal; many want transparency. Amici know from decades of collective law enforcement experience that community trust is a core requirement to effective policing. Amici also know that transparency is an important part of building that trust, while secrecy can seriously undermine it. When internal affairs (IA) and disciplinary information in particular is kept a secret, the community has no way of knowing whether investigations are thorough and fair, and whether officers are properly held accountable for their actions. When communities are deprived of such information, it leads them to believe IA complaints are not taken seriously and that misconduct is swept under the rug. This causes the community to distrust the police.

When police departments have not earned the community's respect, it makes the jobs of all police officers much more

difficult and dangerous. Members of the community are less likely to report crimes that they witnessed and they may suffer in silence when they are victimized. This makes it more difficult for police to do their jobs and makes the community less safe. It also leads to fear of and animosity toward the police. Obviously, there are other significant problems that lead people to distrust the police, including systemic racism within the criminal justice system that disproportionately arrests and incarcerates people of color and incidents of police brutality such as the recent tragic murder of George Floyd. But secrecy only perpetuates those problems and further erodes respect for the police.

The police unions attack the AG's recent decision to disclose the names of officers who receive major discipline, arguing that some officers receive major discipline for what they believe are minor infractions, such as uniform violations or tardiness.[2]

[2] The unions also list the following behavior as "irrelevant" to the public's interest: domestic violence, DWIs, traffic violations, failure to pay child support, failure to make timely reports, sleeping on the job, and similar behavior. But, a police officer "is a special kind of public employee." In re Carter, 191 N.J. 474, 486 (2007) (quoting Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966)). A police officer "must present an image of personal integrity and dependability in order to have the respect of the public." Ibid. This high standard of conduct "is one of the obligations [a police officer] undertakes upon voluntary entry into the public service." In re Phillips, 117 N.J. 567, 577 (1990). If police officers violate the very criminal laws and motor vehicle laws that they are enforcing, that significantly undermines the public's trust. Further, if officers are suspended because they do not follow administrative rules, that suggests

Although the unions are convinced that this justifies secrecy, transparency is the much better option. In addition to building community trust, transparency will let the public see how the police disciplinary system works and may lead the public to push for change so that non-serious infractions do not result in major discipline. The police are the public and the public are the police, and thus the police disciplinary system should involve the public and allow the public to see whether it works the way they would like it to work.

Transparency will also expose discrepancies in discipline and allow the public – and officers – to see whether discipline is imposed consistently. This will particularly benefit Black and Latino officers and others who work in a New Jersey police force that is overwhelmingly white and male. Minority and women officers often complain of being singled out and punished more severely than their white male counterparts. The AG's directives will expose those disparities and better protect minority officers from discrimination and retaliation.

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that those officers may have problems with authority or following rules in general. Disclosure of the discipline helps earn the public's trust because it shows that the agency holds its officers to high standards. Maintaining the public's trust is imperative to effective policing. Amici also direct the Court to Point II, which addresses how disclosure of this information will expose racial disparities in how discipline is imposed.

Amici therefore support AG Law Enforcement Directives 2020-5 and 2020-6. New Jersey has had a policy of total secrecy in police disciplinary matters for decades, which has no doubt played a role in the racial profiling, civil rights abuses, and dysfunctional IA units that have led more than one New Jersey law enforcement agency to be placed under federal monitoring. If law enforcement agencies want to earn the public's trust and become more effective in serving and protecting the public, then the "police code of silence" must be replaced with the "police code of transparency." Although Amici hope for much more transparency in the future and wish to play a role in making such changes, these directives reflect an important step on the path to full transparency and will expose serious problems within New Jersey policing.

Statement of Interest of Amici Curiae

The Amici are non-profit organizations comprised largely of members from the law enforcement community who believe that law enforcement agencies must return to the fundamental principles of modern policing, which means both increasing police-community trust and preventing crime instead of reacting to crime. A key component of police-community trust is transparency, especially in the police disciplinary process. As members of the law enforcement community and criminal justice system, Amici have a special interest and expertise in this matter of significant public importance and they will assist the Court in its resolution of

this case. Accordingly, Amici ask the Court to permit their participation pursuant to Rule 1:13-9.

A. About National Coalition of Latino Officers

The National Coalition of Latino Officers (NCLO) is a non-profit organization with its headquarters in New Jersey. It was founded in 2012 to address the concerns of the many Latino law enforcement organizations and officers throughout the nation. Each of the founding members of NCLO has an extensive background in law enforcement and have all been executive board members of other Latino organizations. Many members are currently law enforcement officers working within New Jersey law enforcement agencies. NCLO believes that together, the Latino law enforcement community must have a strong organization with a decisive and united voice.

NCLO supports more than twenty (20) Latino law enforcement organizations across the nation, including local chapters in New Jersey. NCLO acts as ambassadors between the community and government. It works with the community and all levels of government to bring fairness and equality to the hiring and promotional practices of law enforcement agencies; to provide adequate and valuable training and education to its members in furtherance of their careers; to be an advocate for its member organizations at the state and national level; and to assist member organizations in community outreach programs.

NCLO believes that transparency is necessary to protect the rights of Latino law enforcement officers, as well as Black officers, Asian officers, women officers, and others who are a minority among a New Jersey police force that is overwhelmingly white and male. Too often, NCLO hears stories from Latino officers and other minority officers who have been disciplined more severely than their white male counterparts or who have become the target of a retaliatory internal affairs unit. These officers tell NCLO that their own complaints against fellow officers who discriminate against them are often swept under a rug and never properly investigated. Some of NCLO's own executive board members have experienced this retaliation and discrimination first hand, but all of it is kept hidden from the public. NCLO believes that transparency will expose these problems. Although NCLO wishes the Attorney General's directives included a statewide Latino perspective in its development and provided broad access to IA records and disciplinary files, the directives are nonetheless an initial step in the right direction and must be upheld.

B. <u>About Law Enforcement Action Partnership</u>

The Law Enforcement Action Partnership (LEAP) is a 501(c)(3) nonprofit of police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with

a sole focus on drug policy, today LEAP's speakers bureau consists of more than 200 criminal justice professionals advising on police-community relations, transparency and accountability, incarceration, harm reduction, drug policy, and global issues from a place of unassailable credibility and insight. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

LEAP believes that the key to improving police effectiveness and public safety is to return to the fundamental principles of modern policing, which means both increasing police-community trust and preventing crime instead of reacting to crime. Transparency is a critical component of increasing police-community trust and therefore LEAP has advocated for public access to police internal affairs and disciplinary records. This level of transparency is not only necessary for securing public respect — trust — but it is the public's right because the police exist only because of the public and they do the public's work. Therefore, the public has a right to be informed about all police matters, including the right to access reports and information about police behavior within the community, both good and bad.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici accept the Statement of Facts and Procedural History found in the Attorney General's brief in this matter.

LEGAL ARGUMENT

I. TRANSPARENCY GREATLY BENEFITS POLICE OFFICERS AND LAW ENFORCEMENT AGENCIES SACRIFICE POLICE EFFECTIVENESS AND OFFICER SAFETY WHEN THEY UNDERMINE COMMUNITY TRUST BY MAINTAINING SECRECY IN THEIR DISCIPLINARY PROCESSES

A positive relationship between police and the community is the cornerstone to effective policing and keeping the public safe. This concept is not new. In 1829, Sir Robert Peel, known as the "Father of Modern Policing," set forth a list of nine law enforcement principles that recognized, among other things, that:

- The police need the public's respect and trust;"[3]
- The police are the public and the public are police;[4]

These Peelian Principles, and others, represent an early

[3] Principle Two states: "The ability of the police to perform their duties is dependent upon *public approval* of police existence, actions, behavior and the ability of the police to secure and maintain public respect." Rachel Dissel, The Roots of Policing: Sir Robert Peel's 9 Principles, The Plain Dealer, June 8, 2016 (emphasis added), available at https://bit.ly/2BCeGSH. Principle Three states: "The police must secure the willing cooperation of the public in voluntary observance of the law to be able to secure and maintain public respect." Ibid.

[4] Principle Seven states: "The police at all times should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the intent of the community welfare." Ibid.

version of community policing that guides almost all police departments today. See Debo P. Adegbile, Policing Through an American Prism, 126 Yale L.J. 2222, 2228 (2017); Dissel, The Roots of Policing. In fact, these principles are on full display in Law Enforcement Directive 2020-5:

> More is required to promote trust, transparency and accountability, and I have concluded that it is in the public's interest to reveal the identities of New Jersey law enforcement officers sanctioned for serious disciplinary violations. Our state's law enforcement agencies cannot carry out their important public safety responsibilities without the confidence of the people they serve. The public's trust depends on maintaining confidence that police officers serve their communities with dignity and respect. In the uncommon instance when officers fall well short of those expectations, the public has a right to know that an infraction occurred, and that the underlying issue was corrected before that officer potentially returned to duty.
>
> [Law Enforcement Directive 2020-5 at 2.]

As argued below, earning the community's trust must be a top priority for all law enforcement agencies and law enforcement officers as losing that trust has serious consequences for both the community and the police. To adhere to the Peelian principles and earn the public's trust, police departments must be fully transparent. This includes giving the public access to information about police discipline. Such transparency will greatly benefit

police departments[5] in numerous ways, including by making police departments more effective and by promoting officer safety. The petitioner police unions should not be hostile toward transparency; they should fully embrace it and call for even more, as it will only improve their police departments and make their jobs easier.

A. Community Trust Benefits Police Officers By Making It Easier for Them to Do Their Jobs and By Promoting Safety

Although not stated explicitly, President Obama's Task Force on Twenty-First Century Policing embraced the Peelian Principles. Adegbile, 126 Yale L.J. at 2244 (citing U.S. Dep't of Justice, Final Report of the President's Task Force on 21st Century Policing 9 (May 2015) (hereinafter "Task Force Report"). In fact, "building trust and legitimacy" was the first pillar of policing recommended by the Task Force. Task Force Report at 29. This is because for decades the U.S. Department of Justice has recognized that "[t]he police, one of the foundations of the criminal justice system, must ensure the public trust if the system is to perform its mission to the fullest." U.S. Dep't of Justice, Police Integrity – Public Service with Honor 7 (January 1997).

In Amici's years of collective law enforcement experience, strong police-community ties are essential for law enforcement

[5] Amici also believe that transparency significantly benefits the public as well, as argued in the brief submitted by the ACLU of New Jersey.

agencies. Mutual trust between the community and the police benefits both the police and the community in many ways:

> When there is trust between law enforcement and the community, the community benefits because law enforcement officers place primacy on the community's wellbeing and understand the weight of their responsibility. Police, in turn, benefit from working in a community that appreciates their role in promoting safety and actively supports that common goal.
>
> [Adegbile, 126 Yale L.J. at 2232.]

Strong community-police relations also makes it easier for police to do perform their duties. When law enforcement officers have earned the trust and respect of the community, community members are more likely to comply with police commands, come forward as witnesses to crimes, and report crimes that are perpetuated against them. See Tracey Meares & Tom Tyler, Policing: A Model for the Twenty-First Century, *in* Policing the Black Man 165 (Angela J. Davis ed., 2018) ("If the police are trusted, then people are more likely to give them the benefit of the doubt, allowing them to investigate and to respond to contentious law enforcement actions."); Rachel Macht, Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny, 45 Crim. L. Bull. 1006 (2009) ("Public confidence in police can result in a citizenry more likely to obey commands and more likely to cooperate with law enforcement."); Erik Luna, Transparent Policing, 85 Iowa

L. Rev. 1107, 1162 (2000) ("An individual who trusts law enforcement is more likely to follow its commands; conversely, an untrustworthy police force may confront a substantially less obedient citizenry.").

When police departments work to earn the community's respect and cooperation, that in turn reduces crime:

> Clearly, focusing on public trust and confidence in the context of policing is not inconsistent with an agency's commitments to other goals, including crime reduction. . . . Studies similarly suggest that building trust in the police, the courts, and the law is as effective or even more effective a long-term crime-control approach. When people have greater trust in the police, they are more likely both to obey the law and to cooperate with the police and engage with them. Legitimacy facilitates crime control both directly, because it lower people's likelihood of committing crimes, and indirectly, because it increases public cooperation, which allows the police to solve more crimes.
>
> [Meares & Tyler, Policing: A Model for the Twenty-First Century, at 167.]

Amici also know from first-hand experience that trust and respect promotes not only public safety, but also officer safety. A public that trusts and respects police officers will ensure that police departments have enough resources to perform their jobs safely and a sufficient budget to provide good salaries, benefits, and protective gear to officers. See Macht, 45 Crim. L. Bull. 1006 ("A public that has confidence in its police is more likely to encourage politicians to increase budgets for police. Restoring

trust in law enforcement agencies also results in less pressure from political figures on chiefs and, of course, less tension between communities and street cops.")

These are not just the opinions of Amici or academic scholars, but also the lived experiences and views of most people who work in law enforcement. Studies have shown that ninety percent of police officers agree that it is important for an officer to "know the people, places, and the culture in the areas where they work in order to be effective at their job." Adegbile, 126 Yale L.J. at 2240)). According to a national survey by the Police Executive Research Forum of nearly 300 police agencies that implemented some form of community policing, "more than ninety percent of agencies reported improved police-citizen cooperation, increased involvement of citizens, increased information from citizen to police, and improved citizen attitudes toward police." Id. at 2245. "Almost eighty percent of agencies reported reduced police-citizen physical conflict." Ibid.

B. Transparency Promotes Community Trust, While Secrecy Undermines It

Despite how critical it is that members of the public trust law enforcement, polls show that approximately half of the public actually lacks confidence in the police. See Erik Bakke, Predictive Policing: The Argument for Public Transparency, 74 N.Y.U. Ann. Surv. Am. L. 131, 147 (2018) (citing Jeffrey M. Jones,

In U.S., Confidence in Police Lowest in 22 Years, Gallup (Jun. 19, 2015)). When surveys are broken down by race, the level of trust in police dips even further. See Doug Criss, The One Thing That Determines How You Feel About the Police: Your Age, Race or Political Leaning Play a Role,[6] CNN (July 14, 2017) (observing that 61 percent of whites have confidence in the police, while only 45 percent of Latinos and 30 percent of Blacks have confidence); Katherine J. Bies, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, 28 Stan. L. & Pol'y Rev. 109, 120 (2017) ("Research consistently shows that people of color are more likely than white individuals to view law enforcement with suspicion and distrust.").

Transparency is a core component to building public trust. See Joseph A. Schafer, The Role of Trust and Transparency In the Pursuit of Procedural and Organizational Justice, 8 Journal of Policing, Intelligence and Counter Terrorism 135 (2013) ("[P]ublic support, cooperation or involvement is more likely to be found in [police] forces that have created higher degrees of external trust and transparency."). Shielding police disciplinary records from the public is one action that significantly reduces trust in law enforcement and causes the community to believe that corrupt officers are being protected and misconduct is being swept under

[6] https://cnn.it/2NY7P8H

the rug. See Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public, 22 CUNY L. Rev. 148, 166 (2019) (for the community to believe that police are being accountable, they need "access to the charges, common law decisions, proceedings, and outcomes in order to see justice for themselves"). Secrecy causes distrust in police to fester and has consequences that impact the ability of police officers to do their jobs effectively, such as the public expressing hostility toward the police or even calling to abolish the police altogether. See, e.g., Mariame Kaba, Yes, We Mean Literally Abolish the Police, N.Y. Times, June 12, 2020.[7]

Secrecy has other consequences. Research shows that when the police are perceived as untrustworthy or illegitimate, both police officers and prosecutors will be less effective at serving their community. Bies, 28 Stan. L. & Pol'y Rev. at 120. See also Macht, 45 Crim. L. Bull. 1006 ("If the public perceives the police as untrustworthy, prosecutors will have greater difficulty obtaining convictions in criminal cases where police officers are the sole witness."). Thus, "increasing transparency by publicly disclosing misconduct records should increase community faith and make police officers more effective in protecting their community." Bies, 28 Stan. L & Pol'y Rev. at 120. See also Conti-Cook, 22 CUNY L. Rev.

[7] https://nyti.ms/2ZCsZig

at 166 ("[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective.").

In sum, transparency is a core component of community trust. The movant police unions' opposition to the AG's transparency directives will only work to their detriment, causing the public to believe they have something to hide and cannot be trusted. Secrecy will only further sow division and make it more difficult for police to perform their jobs. This is especially true in this moment, when the public is protesting on a daily basis in New Jersey and across the nation and calling for monumental reforms in policing. The AG responded to such calls for action. If this Court grants the police unions' motions, the public will almost certainly view the decision as taking progress away from them and their distrust in police will only increase.

C. Members of the Community Deserve Access to Police Disciplinary Information So That They Can Determine Whether Police Departments Function the Way They Want Them to Function

Law enforcement agencies must always remember that "the police are the public and the public are police." Dissel, The Roots of Policing (citing Peel's Principle Seven). As LEAP Executive Director Neill Franklin has explained:

> According to Sir Robert Peel of Great Britain, who is viewed by many of our police leaders as the father of modern policing, **the police are the public, and the public are the police.**

> This is principle No. 7 of the nine Peelian Principles. Principle No. 2 states, "To recognize always that the power of the police to fulfill their functions and duties is dependent on public approval of their existence, actions and behavior, and on their ability to secure and maintain public respect."
>
> **In short, we exist because of the public and the work we do "for them" should be approved "by them." As such, the public should be informed of all that we do within the community. They must have access to reports of police behavior within the community, good and bad. This level of transparency is not only necessary for securing public respect — trust — but it is their right.**
>
> [Neill Franklin, Time For A 'Code Of Transparency' In Policing, Baltimore Sun, Mar. 1, 2017 (emphasis added).]

In that regard, police secrecy not only undermines the legitimacy of the police and makes policing less effective, but it also leaves the public in the dark and deprives the community from serving as an important "check" on *their* police departments. Welsh v. City & Cty. of San Francisco, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely."); Worcester Telegram & Gazette Corp v. Chief of Police of Worcester, 787 N.E. 2d 602, 607 (Mass. Ct. App. 2003) ("A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core

value of trust between citizens and police essential to law enforcement and the protection of constitutional rights."). Simply put, police departments belong to the community and the police departments must accept that the community needs access to information about police internal affairs and disciplinary processes so that the public can ensure that they live up to the very high standards that are required of them.

The fact that New Jersey's IA and police disciplinary systems have been locked away in complete secrecy for decades has only created a divide between the public and the police, causing both to believe that they are two separate entities whose interests are averse to each other. They should be one: the police are the public and the public are the police. The AG's directives represent an initial step toward bridging that divide and allowing the public to become part of the police disciplinary process, as is the case in many other states. See Point II(C) of the ACLU-NJ's brief. The police unions must embrace this transparency and not see disclosure as something at odds with their interests; inviting the public into the police disciplinary process will build better police-community relations and will result in a disciplinary process that is fairer to them. See Point II, infra.

II. TRANSPARENCY IN DISCIPLINARY PROCESSES WILL HELP PROTECT THE RIGHTS OF OFFICERS OF COLOR AND WILL IMPROVE THE OVERALL DISCIPLINARY PROCESS FOR ALL OFFICERS

It is no secret that New Jersey law enforcement officers are predominantly white and male. The 2016 Uniform Crime Report showed that only 10.6 percent of New Jersey's 36,290 police officers were women. Div. of State Police, 2016 Uniform Crime Report 174 (2016).[8] Although there appears to be no similar statewide data available on the racial demographics of New Jersey police departments as a whole, a look at individual police departments reveals the lack of racial and ethnic diversity plaguing New Jersey policing:[9]

- The State Police is 77.5 percent white and 80.7 percent male, but the state is only 54.6 percent white and 48.9 percent male
- Paterson's police force is 14.8 percent Black and 17.9 percent Latino, but the city is 28.3 percent Black and 57.6 percent Latino.

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[8] https://www.njsp.org/ucr/2016/index.shtml

[9] A disparity between the demographics police departments and the community violates the core Peelian Principle that "the police are the people and the people are the police." This in turns undermines the community's trust. "A visibly homogeneous police force that does not reflect the racial make-up of the community it patrols may engender resentment among the residents of that community" and can "lead to a breakdown when relations between the police department and the greater community are strained." Allan N. MacLean, The "Critical Mass" and Law Enforcement, 14 B.U. Pub. Int. L.J. 297, 301 (2005) ("The existence of a diverse police department can reassure a community that the department will not act in a discriminatory manner. This will, in turn, lead to even better policing, since community cooperation with police investigations leads to more solved crimes and a correlative reduction in criminal behavior.").

- Elizabeth's police force is just 9.6 percent Latino, but the city is nearly 60 percent Latino.

- Newark's police force is 26.5 percent black and 22.5 percent Latino, but the city is nearly 50 percent Black and 33.8 percent Latino.

- Jersey City's police force is 12.7 percent Black and 22.5 percent Latino, but the city is 23.9 percent Black and 27.6 percent Latino.

- Plainfield's police force is 10 percent Latino, but the city is 40 percent Latino.

See Office of the AG, Diversity & Inclusion Annual Report[10] 26 (2017); Sergio Bichao, The Racial Gap Of N.J. Police Departments, MyCentralNJ.com, January 21, 2015.[11]

Because of this lack of diversity, it can be especially daunting to work as a police officer in this State if one is not white or male. Policing in general is "not only a masculine culture" but one "dominated by a white, heterosexual, masculine perspective." Meghan E. Hollis, Accessing the Experiences of Female and Minority Police Officers: Observations from an Ethnographic Researcher, *in* Reflexivity in Criminological Research (2014). Black and Latino officers also work within a criminal justice system that has disproportionately arrested, incarcerated, and used force against communities of color for centuries, meaning that these officers know that their friends and family members

[10] https://bit.ly/2ZG6Srn

[11] https://bit.ly/3f4Stew

have been or may be targeted by the very police departments in which they work, and sometimes they are even targeted themselves:

> "Many of my members [of color] are angry, because [Eric Garner] could have been our son, our brother, our father," [said Noel Leader, co-founder of Blacks in Law Enforcement Noel Leader]. "When you're African-American, you understand that you have the uniform, [but] members of your families do not. So we are more sympathetic and more sensitive to this type of injustice than others are."
>
> . . .
>
> Cops of color know that out of uniform, they're just as susceptible to police aggression as any minority on the street — as are their family members. Stories of off-duty [B]lack and Latino cops being stopped and frisked, manhandled or even killed by fellow officers abound. Naturally that makes them more sensitive to the Ferguson and Staten Island cases, which are the most recent, visible examples of a systemic pattern of police exoneration after killing African-Americans. It also makes them, on the whole, more sensitive to protesters' cries of racism in the street, despite their trained poker faces.
>
> [Aaron Miguel Cantú, Making Sense Of The Minority Police Officer Experience, Mashable, Dec. 18, 2014.[12]]

A 2017 study, which interviewed Black male police officers working in New Jersey police departments, provides important insight to the experiences of officers of color in this state. See Michael Armstrong Campbell, African American Male Police

[12] https://bit.ly/31X0RsK

Officers' Perceptions of Being Racially Profiled by Fellow Police Officers,[13] Walden University (2017). Many of the officers reported that they "feel unworthy, believe they are treated as second class citizens, and believe that they are viewed as a departmental token"[14] and that racial discrimination "resulted in limited opportunities within their own police agency, such as not being promoted to leadership positions." Id. 59-60 (reporting that officers feel low morale, "hopelessness," and like their complaints of discrimination are not taken seriously). NCLO has heard these same complaints from Latino officers.

Officers of color and women often complain that police internal affairs and disciplinary processes are unfair. See Rich Morin, et. al., Behind The Badge: Inside America's Police

[13] https://bit.ly/3izEGz4

[14] One officer's response highlights why an organization such as Amicus NCLO exist:

> I must admit, a lot of times my morale was low, but I was able to depend on my fellow minority officers to give me a needed boost. I was a member of an organization with minority officers who were experiencing or had similar experiences in the past; they were able to relate to my situation. We spoke about each situation when it came up and steps that may be taken by others to help make them stay strong in that environment. It was a very good support group. I needed that group to survive.
>
> [Campbell at 119.]

Departments, Pew Research Center (January 11, 2017) (discussion of survey of nearly 8,000 police officers from 100 police departments that revealed that white men are more likely to say that the disciplinary process in their agency is fair than are women or Black and Latino officers). A recent study by the *Boston Herald* of the Boston Police Department's disciplinary practices revealed that Black officers are disciplined at a substantially higher rate than white officers. See Matt Stout & O'Ryan Johnson, Black Boston Police Officers Facing Higher Disciplinary Rates than White Counterparts, Boston Herald, November 18, 2018 ("Black officers make up just 23 percent of the police force, and whites about two-thirds, the review found. But over the past two years an equal number of [B]lack and white officers — 14 of each — have faced suspensions, indicating blacks are being found in the wrong and disciplined at a dramatically higher rate."). Because New Jersey has kept IA and disciplinary information a complete secret for decades, it is difficult for scholars or journalists to study the racial disparities in police discipline that happen in this state.

Simply put, minority police officers know first-hand that the racial disparities that exist in arrests and incarceration often spill over into the police workplace. The current system of secrecy in New Jersey's police discipline is harmful to officers of color and deprives them of the information they need to protect themselves. As well-known civil rights lawyer Cynthia Conti-Cook

explains:

> Contrary to the increased opacity many union representatives claim will improve the fairness of the disciplinary system, officers also lose out when police departments hide their misconduct. When departments conceal the average penalty for any specific offense, it prevents officers who have been treated unfairly from analyzing whether their penalty was disproportionately harsh. Investigations into racially biased or disproportionately punitive treatment could utilize data of reasonable or average penalties for similar misconduct. Yet, BuzzFeed's investigative reporter, attempting to write the story about a Black woman wrongly accused of misconduct by a supervisor, cannot access sufficient data for her in-depth article about racial discrimination in the police disciplinary process or even get a transcript from one hearing. This secrecy also allows abusive supervisors the same type of powerful, reliable impunity when disciplining officers that police officers have when arresting citizens. Increased transparency of the police disciplinary process could deter unjust prosecutions of police, as well as disproportionately harsh penalties for minor misconduct.
>
> [Conti-Cook, 22 CUNY L. Rev. at 166.]

Transparency alone will obviously not fix the racial disparities of our criminal justice system or within our police departments, but it is the starting point to identifying problems so that solutions can be found. AG Law Enforcement Directives 2020-5 and 2020-6 are important steps to the type of full transparency that will allow organizations like Amicus NCLO to gather data to protect their members and show whether Latino officers or other

officers of color are disciplined more severely than their white counterparts.[15] Transparency is especially important now, during this national reckoning on race.

CONCLUSION

Accordingly, Amici encourage the court to deny the police unions' motions to stay Attorney General Law Enforcement Directives 2020-5 and 2020-6.

Respectfully Submitted,

Pashman Stein Walder Hayden,
Attorneys for Amici Curiae,
National Coalition for Latino Officers and Law Enforcement Action Partnership

July 7, 2020

/s CJ Griffin
CJ GRIFFIN, ESQ.

[15] Of course, white officers will also benefit by being able to see whether the discipline they received was fair in comparison to other officers. Moreover, making major discipline available to the public will hopefully encourage investigators to investigate cases more carefully and discourage supervisors from imposing disparate or unfair penalties upon officers. Further, there are department-wide benefits as well; making it publicly known when discipline is imposed upon any particular officer can lead other officers to comply with departmental rules and regulations. "Because discipline plays a central role in teaching officers about the gravity of misconduct, it is important that a department's disciplinary decisions are known to officers and thus enable them to learn from these decisions." Carl B. Klockars, et al., Enhancing Police Integrity 258 (2007). In that regard, disclosure of disciplinary actions promotes better behavior because officers see the consequences of rules and regulations violations.

IN THE

Supreme Court of New Jersey

A-26/27/28/29/30-20
(085017)

IN RE ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NOS. 2020-5 AND 2020-6	:	**CIVIL ACTION**
	:	ON PETITIONS FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
	:	DOCKET NOS. A-3950-19T4; A-3975-19T4; A-3985-19T4; A-3987-19T4; and A-4002-19T4
	:	*Sat Below*: JUDGES MITCHEL E. OSTRER, P.J.A.D, ALLISON E. ACCURSO, J.A.D. AND FRANCIS J. VERNOIA, J.A.D.
	:	ON REVIEW OF FINAL AGENCY ACTION FROM THE OFFICE OF THE ATTORNEY GENERAL

BRIEF OF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, NEW JERSEY STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, LIBERTARIANS FOR TRANSPARENT GOVERNMENT AND 24 OTHER ORGANIZATIONS IN SUPPORT OF TRANSPARENCY IN POLICE DISCIPLINARY RECORDS

JEANNE LoCICERO (024052000)
ALEXANDER SHALOM (021162004)
KAREN THOMPSON (313662019)
MOLLY K.C. LINHORST (329982020)
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
Post Office Box 32159
570 Broad Street, 11th Floor
Newark, New Jersey 07102
973-854-1715
jlocicero@aclu-nj.org

Counsel for amici curiae

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INTEREST OF *AMICI*

Proposed *amici* are 27 organizations that believe that public trust in law enforcement can only be achieved where police disciplinary records are made available to the public, and that this is an urgent policy priority. A shared belief in transparency unites this diverse group of organizations. Among the *amici* are civil rights organizations, immigrants' rights organizations, faith-based organizations, women's health organizations, Libertarian organizations, housing organizations, workers' rights organizations, and organizations that represent or advocate on behalf of a wide range of New Jersey communities, including parents, youth, and families, survivors of intimate partner violence and sexual assault, people with disabilities, individuals identifying as LBGTQ+, and survivors of isolated confinement and detention.

The organizations signing on to this brief include: American Civil Liberties Union of New Jersey; Bayard Rustin Center for Social Justice; Cherry Hill Women's Center; Ethical Culture Society of Bergen County; Fair Share Housing Center; Faith in New Jersey; Housing & Community Development Network of New Jersey; Latino Action Network; LatinoJustice PRLDEF; Legal Advocacy Project of UU FaithAction New Jersey; Libertarians for Transparent Government; National Association for the Advancement

of Colored People (“NAACP”) New Jersey State Conference; NAACP Newark; National Organization for Women of New Jersey; Newark Communities for Accountable Policing; New Jersey Alliance for Immigrant Justice; New Jersey Clergy Coalition for Justice; New Jersey Coalition Against Sexual Assault; New Jersey Institute for Social Justice; New Jersey Prison Justice Watch; Partners for Women and Justice; People’s Organization for Progress; Salvation and Social Justice; Service Employees International Union 32BJ; SPAN Parent Advocacy Network; Volunteer Lawyers for Justice; and Women Who Never Give Up.

PRELIMINARY STATEMENT

Petitioner unions frame this case as a bilateral disagreement between police officers (through their unions) and the Attorney General about whether some police disciplinary records should be made public. They ignore a critical third party implicated by the dispute: the public.

New Jerseyans have access to knowledge about disciplinary action taken against a wide range of professionals from manicurists to judges. Police officers – entrusted to carry weapons and use force – stand in a unique position in our society. To ensure accountability, that distinctive status requires additional transparency, not less. (Point I, A).

For more than a decade, advocates in New Jersey and nationally have urged leaders to reform police disciplinary systems that operate in secret and deprive the public of critical information about law enforcement officers. (Point I, B).

For years, even decades, law enforcement executives under pressure from police unions have resisted calls for increased transparency in the disciplinary process. The tragic and well-documented murder of George Floyd by police officers in Minneapolis, Minnesota, has served as an impetus for change around the nation. Communities are heeding the call to act upon a broad range of police reforms, and police executives have

begun to realize that police discipline cannot remain secretive. (Point I, C).

The police unions oppose all steps toward greater transparency, assuring the Court that the system is already sufficiently transparent and seeking to halt the momentum for meaningful change. The police unions raise particular concerns about officers who received harsh discipline for less serious misconduct and those officers who left the police force after receiving discipline. But the public's interest in knowing about officer discipline is not only to assure itself that rogue officers are not walking the beat; people also want to have confidence that policing systems are fair. If officers receive harsh discipline for minor misbehavior, but avoid sanctions for major violations of public trust, communities want to know. Also, absent a system for the licensing of police officers, officers who leave one department may soon be hired in another or seek other roles of public trust. People therefore have an ongoing need for information about complaints levied and discipline imposed against all officers, whether retired or not, to prevent officers from evading accountability for prior misconduct. (Point II, A).

Those who recognize the critical need for change appreciate that transparency in the disciplinary process promotes confidence in police. There exists a direct link between trust

in police and improved public safety outcomes. But communities that distrust the police are less likely to cooperate with law enforcement, harming the ability of police to investigate and prosecute serious crimes. In this historic moment, the public has made clear that building this trust and confidence is an imperative. (Point II, B).

The police unions warn that a more transparent disciplinary process will lead to harassment of police officers and the revelation of medical information and other private material. But more than a dozen other states already allow for public access to police disciplinary records. There exists no evidence that police officers in those states are harassed or unable to safeguard legitimately private information. (Point II, C).

Indeed, the privacy concerns raised by the police unions – concerns to which *amici* are sensitive – to the extent they exist, pale in comparison to the countervailing public interest in transparency. Where there exist legitimate privacy concerns, they can be addressed through redaction rather than blanket withholding of information. (Point II, D).

The vital question of the public availability of police disciplinary records involves far more than a collective bargaining agreement: it implicates the relationship between police and the communities they serve; indeed, it implicates the very legitimacy of a police force. *Amici* urge the Court to

consider the interests of the public in evaluating, and act quickly to reject, the police union's request to strike down the Attorney General's modest step toward transparency, which has already been delayed for months.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici accept the Statement of Facts and Procedural History contained in the published Appellate Division decision dated October 16, 2020. *In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, 465 N.J. Super. 111 (App. Div. 2020). Petitioner unions filed Petitions for Certification. On November 25, 2020, the Court granted the Petitions and set a peremptory, expedited briefing schedule. This brief follows. *R.* 1:13-9.

ARGUMENT

I. NEW JERSEY COMMUNITIES, LIKE COMMUNITIES AROUND THE COUNTRY, RECOGNIZE THAT POLICE ACCOUNTABILITY REQUIRES TRANSPARENCY OF POLICE DISCIPLINE.

There is no legitimate reason to limit transparency regarding police disciplinary records. New Jerseyans have been waiting for decades for a transparent, accountable process that ensures that police officers who engage in misconduct do not escape accountability and that our law enforcement agencies are treating people fairly and holding themselves to the same standards to which they hold communities. Attorney General Directives 2020-5 and 2020-6 move the state in the right direction, towards accountability, and communities can no longer

wait in demanding these changes. As the Reverend Dr. Martin Luther King, Jr. observed, in the struggle for civil rights, "'Wait' has almost always meant 'Never.' We must come to see, . . . that 'justice too long delayed is justice denied.'" Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963). The Attorney General issued these critical directives in June, 2020. Argument in this matter is now scheduled for March, 2021. New Jerseyans cannot afford to wait any longer.

A. Complaints made against other regulated professionals are public records in New Jersey; the public requires more transparency for police officers, not less.

All licensed and otherwise regulated professionals recognize that complaints against them may, at some stage, be made public. Indeed, consumers who seek to file complaints against service providers licensed by regulatory boards are explicitly told that "[a]ny information you supply may be subject to public disclosure pursuant to New Jersey's Open Public Records Act." New Jersey Division of Consumer Affairs, *To File a Complaint*.[1] As a result, potential complainants are urged "not [to] submit sensitive personal information" on the complaint forms provided on the Division's website. *Id.*

Indeed, the Division of Consumer Affairs makes public significant information about complaints filed and disciplinary

[1] Available at https://www.njconsumeraffairs.gov/Pages/Consumer-Complaints.aspx (last accessed Dec. 14, 2020).

action taken. New Jersey Division of Consumer Affairs, *Person Search*.[2] Where regulatory boards have taken action – including the mere act of *receiving* complaints – there is a public-facing indication of that action. *Id.* Specifically, the public learns when a Board has issued "a Consent Order, Cease and Desist Order, Interim Order, Reprimand, a finalized Uniform Penalty Letter, agreed upon Settlement Letter or Final Order." *Id.* (search "Master Plumbers" for "Michael Perri", for an example). The public can learn from a simple web search when there exists a "pending matter such as an Administrative Complaint or a Provisional Order of Discipline. . . ." *Id.* In those instances, the website tells the public that the pending matter only "represent[s] the filing of allegations by the Attorney General, and do[es] not represent a finding of misconduct until the matter is adjudicated by the Board." *Id.* Members of the public can "obtain a copy of [any] such documents" by "[c]ontact[ing] the Board/Committee directly. . . ." *Id.*

In short, for dozens[3] of regulated professions in New Jersey, transparency in the disciplinary process is the norm.

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[2] Available at https://newjersey.mylicense.com/verification/Search.aspx (last accessed Dec. 14, 2020).

[3] New Jersey regulates more than 75 professions. *See* New Jersey Division of Consumer Affairs, *Licensed Professions and Occupations*, available at https://www.njconsumeraffairs.gov/Pages/Licensed-Professions-

The police unions contend that making some police disciplinary records public defies existing law, which the police unions mistakenly conclude prohibits the release of all public employee records. NCOBr at 9-10.[4] Their claim is undermined by the existing public access to disciplinary records for non-law enforcement licensed professionals.

For more than the last quarter century, when lawyers, who are regulated by the Judiciary, have faced allegations of misconduct, the public has had access to the complaints as soon as the chair of the District Ethics Committee determines that "there is a 'reasonable prospect of a finding of unethical conduct by clear and convincing evidence.'" *R.M. v. Supreme*

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and-Occupations.aspx (last accessed Dec. 14, 2020). Notably, as discussed below (Point II, C), New Jersey is an outlier among states that does not require licenses for police officers.

[4] The following abbreviations are used in this brief:

"NCOBr" refers to the Appellate Division brief filed by the Non-Commissioned Officers and Superior Officers Association filed on July 1, 2020.

"NCO Pa" refers to the appendix accompanying the Non-Commissioned Officers and Superior Officers Association Appellate Division brief. *Amici* use the Bates-stamped references contained therein.

"STFABr" refers to the Appellate Division brief filed by the State Trooper Fraternal Association filed on July 2, 2020. The Appendices that accompany it are labeled but not Bates stamped.

Court of N.J., 185 N.J. 208, 214, 216 (2005) (quoting *R*. 1:20-4(a)).

In adopting this scheme for transparency of attorney discipline – after years of keeping such proceedings secret – the Court explained that "[t]he confidential nature of initial complaints and initial determinations generate the risk of public distrust. . . . We deal with the risk or perception of distrust . . . by opening up the system, eliminating its secrecy, and substantially increasing public participation in the disciplinary process." Mark E. Hopkins, Note, *Open Attorney Discipline: New Jersey Supreme Court's Decision to Make Attorney Disciplinary Procedures Public - What it Means to Attorneys and to the Public*, 27 Rutgers L. J. 757, 763 (1996).[5]

The Court has also explained how criticism of judges, though perhaps unpleasant, uncomfortable, and unwelcome, actually serves as a test of the strength of democratic institutions:

> [P]ublic criticism [of judges] will in fact improve, rather than prejudice, the administration of justice. It will remind judges that they are officials of the state and that their actions, like those of other

[5] *Amici* sought to obtain the original document, Supreme Court of New Jersey, *Administrative Determinations Relating to the 1993 Report of the New Jersey Ethics Commission*, July 14, 1994. The document is not available online and the State Law Library could not provide a hard copy as a result of COVID-19-related closures. Thus, *amici* cite to secondary sources describing the Report.

> officials, will be reviewed and judged by the citizenry. There is no reason to believe that public statements about the official behavior of judges, even when not accurate, reduce the ability of our legal system to protect rights and do justice. There is every reason to believe that public scrutiny and debate about the conduct of public officials is a necessary element of our system of government. Unlike authoritarian governments that stifle both participation in politics and public debate, our system of government encourages citizens to speak their minds on issues of public importance. We do not fear criticism of officials. We welcome it and we expect it to be vigorous and forthright. We want active and informed citizens, not timid subjects.
>
> [*In re Hinds*, 90 N.J. 604, 639-640 (1982).]

If the public benefits from access to complaints about manicurists, dentists, court reporters, master plumbers, lawyers, and judges, why are police officers treated differently?

There can be no doubt that police officers, who are regulated by the Attorney General, are "a special kind of public employee." *In re Carter*, 191 N.J. 474, 486 (2007) (quoting *Twp. of Moorestown v. Armstrong*, 89 N.J. Super. 560, 566 (App. Div. 1965), *certif. denied*, 47 N.J. 80 (1966)). Entrusted to carry weapons and use force, police officers recognize that they may be held to different standards than the general public. Law enforcement "undertakes [this elevated expectation] upon voluntary entry into the public service." *In re Phillips*, 117

N.J. 567, 577 (1990) (*quoting In re Emmons*, 63 N.J. Super. 136, 142 (App. Div. 1960)).

But the unique role of police in our society counsels in favor of more transparency, not less. As the Supreme Court of Oregon has explained:

> [T]he public interest in the transparency of government operations is particularly significant when it comes to the operation of its police departments and the review of allegations of officer misconduct. Every day we, the public, ask police officers to patrol our streets and sidewalks to protect us and to enforce our laws. Those officers carry weapons and have immense power. Some members of the public fear the abuse of that power. By the same token, police officers are themselves vulnerable. Many of those who drive our streets and walk our sidewalks also carry weapons. Some officers fear their use of those weapons and their resistance to legal authority. When our system of justice works as we expect it to, officers use their authority legitimately, members of the public comply with their instructions, and the dangers of escalating violence are avoided. But for our system to work as we expect it to, the public must trust that officers are using their authority legitimately, and officers must trust that the people they stop will respond appropriately. Without mutual trust, the police cannot do their work effectively and the public cannot feel safe.
>
> One way to promote that necessary mutual trust is to make police practices and procedures transparent and to make complaints about police misconduct and the discipline that is or is not meted out open to public inspection. It is important for the public to know when the police overstep; it is important for the public to know when

> they do not. And it is important that the basis for differing results be known and understood.
>
> [*Am. Civil Liberties Union of Oregon, Inc. v. City of Eugene*, 380 P.3d 281, 297–98 (Or. 2016).]

This Court's observation about attorney discipline applies with equal force to police discipline: "Public scrutiny is essential to every aspect of the justice system . . . . Public scrutiny assures the system's excellence, for no flawed system of justice will survive in a democracy when subjected to public scrutiny." Asbury Park Press, *Lawyer discipline: Supreme Court opens ethics process to public*, July 20, 1994.

B. The murder of George Floyd has redoubled the long-standing efforts of New Jersey advocates to make police discipline records public as a prerequisite for meaningful police accountability.

New Jerseyans, unfortunately, are all too familiar with misconduct by law enforcement officers. Yet, because of the secrecy around police disciplinary records, residents only learn about police misconduct in limited circumstances: when it spills out into the public through the posting of phone videos or body camera footage, reports of court cases, or leaks, and occasionally, through government reports. Previous police reform efforts have failed to make discipline records public, and have thereby failed to adequately address police misconduct while leaving communities most impacted by that misconduct in the dark.

By way of example, twenty-one years ago, Governor Whitman admitted that state troopers racially-profiled Black and Latino drivers by targeting them for stops and searches, and that there was a toxic, hostile workplace culture fostered by white male officers. Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, N.Y. Times (Apr. 21, 1999);[6] *see also* David Kocieniewski, *Bias Permeates the State Police, Whitman Admits*, N.Y. Times (July 3, 1999).[7] In spite of years of complaints against the State Police, and a successful motion to suppress drug evidence that documented that state troopers stopped people of color nearly five times more frequently than white drivers, *State v. Soto*, 324 N.J. Super. 66, 71, 84-85 (Law Div. 1996), the reckoning of racial profiling only began in the aftermath of a high profile shooting of three Black men by white troopers in April 1998 which resulted in the return of indictments for attempted murder against the troopers.

Even in 1999, at the beginning of state police reforms that would include 10 years of federal oversight, advocates understood that secrecy would hinder accountability, and it most certainly did. Indeed, following the revelations of profiling,

[6] https://www.nytimes.com/1999/04/21/nyregion/whitman-says-troopers-used-racial-profiling.html

[7] https://www.nytimes.com/1999/07/03/nyregion/bias-permeates-the-state-police-whitman-admits.html

Governor Whitman released a report by the Attorney General on the toxic internal culture of the state police. Rev. Reginald T. Jackson "complained that the report failed to name anyone who tolerated or participated in discrimination or harassment." Kocieniewski, *Bias Permeates the State Police, Whitman Admits*. Attorney William Buckman noted that historically "the state police discipline system was veiled in secrecy, the good ol' boys protected each other and it turned into a civil rights disaster. If they are allowed to continue that secrecy, there's no reason to believe that anything will change." *Id.* In fact, during the reorganization of the State Police in the months that followed, many of the supervisors who were responsible for racial profiling as well as racial and gender discrimination remained in positions of authority. David Kocieniewski, *After Profiling Scandal, Tough Choices for New Jersey Police Leader*, N.Y. Times (Mar. 5, 2000).[8] In one "noteworthy" instance, an officer who had been named as a defendant in three discrimination suits with significant allegations of workplace misconduct was promoted to deputy superintendent. *Id.*

A decade later, advocates continued to push for transparency around complaints and any subsequent disciplinary

[8] https://www.nytimes.com/2000/03/05/nyregion/after-profiling-scandal-tough-choices-for-new-jersey-police-leader.html

efforts. A 2009 report by the ACLU-NJ called for police agencies to publish citizen complaints, outcomes, and the disciplinary action taken. ACLU-NJ, *The Crisis Inside Police Internal Affairs*, 22 (June 2009).[9] The report described the secretive process in which public officials refused to confirm or deny when an investigation is taking place, and noted that even where an investigation is publicly reported, the outcome of that investigation usually is not: "the lack of transparency means that the community is left with speculation rather than facts." *Id.* at 20.

The ACLU-NJ followed up in 2010 with then-Attorney General Paula Dow, urging for a statewide review of internal affairs practices, including public reporting. Deborah Jacobs, Letter to Attorney General Paula Dow, Sept. 15, 2010.[10] The following year, the ACLU-NJ called on Mayor Cory Booker to release the internal affairs records of candidates for the Newark Police Director, a key position in the wake of the 2011 announcement that the U.S. Department of Justice ("DOJ") would be investigating the Newark Police Department for civil rights abuses. Deborah Jacobs,

[9] Available at https://www.aclu-nj.org/files/3013/1540/4573/060409IA2.pdf.

[10] Available at https://www.aclu-nj.org/files/7013/2447/7133/Letter_to_Dow_re_IA_Stats_9-15-10_v_2_2_with_attachment.pdf.

Release Newark Police Director's Disciplinary Records, The Star Ledger (May 10, 2011).[11] Advocating for "the release of police disciplinary records in all circumstances," Jacobs explained that police officers' unique authority makes the public's need for information critical to determine whether the disciplinary systems are functioning appropriately. *Id.*

In 2014, the DOJ released its investigative report and entered into a consent decree with the city of Newark, confirming that the Newark Police Department had been engaging in patterns and practices of unconstitutional conduct. U.S. Dept. of Justice, *Investigation of the Newark Police Department*, July 22, 2014 (hereinafter "DOJ report").[12] The DOJ report revealed widespread, systemic problems with the NPD's internal affairs system, concluding that the "NPD ha[d] neither a functioning early warning system nor an effective internal affairs structure[.]" *Id.* at 3. Over a five-year period, the NPD only made one finding that an officer had used unreasonable force, even though the public had made hundreds of complaints over that period. *Id.* at 23. In contrast, the DOJ reviewed a

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[11] https://www.nj.com/njv_guest_blog/2011/05/release_newark_police_director.html

[12] Available at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf.

subset of 67 complaints and found that 14 incidents involved unreasonable force and 27 files did not have sufficient information to make a determination. *Id.* The public was only able to learn about Newark's broken, unaccountable internal affairs system that was failing residents because of this external federal review, conducted only after the ACLU-NJ filed a petition seeking federal assistance, James Queally, *Newark police to be monitored by federal watchdog, sources say*, The Star Ledger (Feb. 9, 2014),[13] a route that has been unavailable since 2018.[14]

All forms of misconduct by law enforcement officers, including discriminatory conduct, remains hidden from the public. For example, the public only learned of rank anti-Semitism in the Haddonfield Police Department through litigation. *Cutler v. Dorn*, 196 N.J. 419 (2008) (jury found officer was subject to a discriminatory hostile work

[13] https://www.nj.com/essex/2014/02/justice_department_will_place_federal_monitor_over_newark_police_sources_say.html

[14] In 2018, the United States Department of Justice implemented a policy that all but eliminates federal oversight of police departments. *See* Jacey Fortin, *Jeff Sessions Limited Consent Decrees. What About the Police Departments Already Under Reform?*, N.Y. Times (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/sessions-consent-decrees-police.html. Although the next United States Attorney General might reverse that policy, pattern and practice investigations are sufficiently rare that they cannot serve as a replacement for other accountability measures.

environment). More recently, the Attorney General successfully resisted releasing information under the Open Public Records Act that would reveal the name of a state trooper who engaged in "racially offensive behavior." *Libertarians for Transparent Gov't v. N.J. State Police*, 2019 N.J. Super. Unpub. LEXIS 1156 (App. Div., May 20, 2019), *certif. granted.* 239 N.J. 518 (2019), *appeal dismissed*, 243 N.J. 515 (2020).[15] Likewise, the Union County Prosecutor's office was successful in its appeal seeking to reverse a trial court order requiring it to release internal affairs documents about the city of Elizabeth's police chief who was forced out for using racist and sexist slurs. *Rivera v. Union Cnty. Prosecutor's Off.*, 2020 N.J. Super. Unpub. LEXIS 1192 (App. Div. June 19, 2020).[16] The only reason why the public learned about the hostile work environment created by the chief – and was able to exert pressure to remove him from office - was because the person who filed an internal affairs complaint decided to share the results with the media. Ali Watkins, *Police*

[15] The unpublished opinion is attached to the STFA brief before the Appellate Division. STFABr at Exhibit A. Pursuant to *R.* 1:36-3, counsel knows of no contrary precedent. After the Attorney General modified the policy at issue in the case, the Attorney General provided the identity of the trooper and the parties agreed that the appeal was moot and entered a consent dismissal.

[16] The unpublished opinion is attached to the STFA brief before the Appellate Division. STFABr at Exhibit B. Pursuant to *R.* 1:36-3, counsel knows of no contrary precedent.

Director in New Jersey Resigns After Inquiry Finds He Used Racist and Sexist Slurs, N.Y. Times (Apr. 29, 2019).[17]

Even as political leaders have learned of these and other additional systemic failures with internal affairs systems, there were no meaningful improvements to accountability and transparency until the directives that are the subject of this appeal were issued. *See*, *e.g.*, Mark Mueller, NJ Advance Media for NJ.com, *Law and disorder: Edison's police force plagued by infighting, lawsuits*, NJ.com (Dec. 9, 2012) (reporting deep and troubling dysfunction at the Edison Police Department including the use of internal affairs to retaliate against fellow officers);[18] Sergio Bichao, *Central Jersey police uphold just 1% of force complaints*, My Central Jersey (Aug. 10, 2014) (reporting that internal affairs investigations are one of the most controversial topics in law enforcement and that law enforcement resists reform efforts: "police enjoy a level of workplace confidentiality not granted to private-sector professionals in the state").[19] With access to information about police misconduct, the public can seek accountability for

[17] https://www.nytimes.com/2019/04/29/nyregion/elizabeth-police-racism-james-cosgrove.html

[18] https://www.nj.com/middlesex/2012/12/edison_police_lawsuit_intimida.html

[19] https://www.mycentraljersey.com/story/news/2014/08/10/nj-use-of-force-internal-affairs-investigations/13822965/

misconduct from lawmakers and law enforcement leaders, and ensure that police are operating in ways that are consistent with the values of the communities they serve. (See, Point II, A, *infra*).

When explaining why legislative efforts to reform internal affairs failed, one advocate noted that the public is "up against an entity that doesn't want to have a spotlight put on it and that's our law enforcement." Ken Serrano, *Police opposed law aimed to fix Edison department with criminal cops*, Asbury Park Press (Jan. 18, 2019).[20] That remains the case today, as some law enforcement executives and officer unions, including Petitioner unions in this case, continue to resist efforts to increase transparency.

C. The murder of George Floyd has caused many Americans, including the law enforcement executives, to reexamine long-held beliefs about policing.

On May 25, 2020, Derek Chauvin, a white police officer in Minneapolis, Minnesota with 18 complaints on his record, killed George Floyd, a Black man, when he kneeled on Mr. Floyd's neck for almost nine minutes. Associated Press, *Minneapolis cop who knelt on George Floyd's neck charged with murder*, NJ.com (May 29, 2020).[21] The video of that heinous incident has caused

[20] https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/edison-police-department-criminal-cops/1039312001/

[21] https://www.nj.com/crime/2020/05/minneapolis-cop-who-knelt-on-george-floyds-neck-charged-with-murder.html

Americans, and people around the world, to seriously examine the role of policing in society. For many white people, the incident has served to unavoidably illustrate what people of color, and Black people in particular, have long known about the deeply-ingrained racism in law enforcement systems.[22] Jill Lawless, Associated Press, *George Floyd's death an American tragedy with global echoes*, The Philadelphia Tribune (June 5, 2020).[23]

As they have done in the wake of similar police brutalities for decades, in the months since Mr. Floyd's death, Black people and people of color have led multiracial protests and driven conversations nationally and in New Jersey about systemic racism, its effects on Black communities and psyches, and how racism itself manifests in police violence and misconduct. *See,*

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[22] During this time, many have also been grieving and responding to recent killings of other Black people where there has been little, if any, accountability, including the killings of Breonna Taylor and Ahmaud Arbery, to, sadly, only name two. *See* Richard Hall, *'Say her name': Breonna Taylor and the underreported scourge of police violence against black women*, The Independent (June 5, 2020), https://www.independent.co.uk/news/world/americas/breonna-taylor-birthday-george-floyd-protests-louisville-a9551946.html; Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. Times (June 24, 2020), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

[23] https://www.phillytrib.com/news/george-floyds-death-an-american-tragedy-with-global-echoes/article_01cc190f-d902-505f-9b39-4a752d195c67.html

e.g., Keeanga-Yamahtta Taylor, *Of Course There Are Protests. The State Is Failing Black People*, N.Y. Times (May 29, 2020) (linking the protests to intersecting injustices exposed by the COVID-19 crisis and disparities in policing during the pandemic);[24] Tré Moore, *On the Murders of George Floyd and Ahmaud Arbery*, The Star Ledger (June 4, 2020) ("How are we supposed to feel safe knowing that people who are supposed to protect us are killing us?").[25]

Due to the public's clear view of the violence used by Derek Chauvin to kill Mr. Floyd, immediately after the killing, public views on racism in general and racial discrimination in policing in particular shifted significantly, with polls showing that people were more open to saying that police engage in racial bias. A June 2020 Monmouth University poll revealed that 76 percent of Americans agreed that racial and ethnic discrimination is a "big problem" – an increase of 25 points since 2015. Giovanni Russonello, *A 'Seismic Shift' in the Views on Racism in America*, N.Y. Times (June 6, 2020).[26] The

[24] https://www.nytimes.com/2020/05/29/opinion/george-floyd-minneapolis.html

[25] https://www.nj.com/opinion/2020/06/on-the-murders-of-george-floyd-and-ahmaud-arbery-that-could-be-me.html

[26] https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html

percentage of people who believe that police officers are more likely to use excessive force against Black people than to mistreat white people has also increased dramatically, reaching 57 percent, with about half of white people in agreement. *Id*. With an overwhelming majority of the public – 78 percent – saying that protesters' anger is fully or somewhat justified, *id.*, it is not surprising that communities and their elected leaders are reconsidering the role of police and how to hold them accountable for misconduct. *See, e.g.,* Mark Berman & Tom Jackman, *After a summer of protest, Americans voted for policing and criminal justice changes*, Wash. Post (Nov. 14, 2020);[27] Sam Levin, *Minneapolis lawmakers vow to disband police department in historic move*, The Guardian (June 7, 2020);[28] Paul D'Auria, C*ould Jersey City get a police oversight board?*, The Jersey Journal (May 31, 2020).[29]

While Black people and people of color have identified systemic racism and police brutality in their communities for

[27] https://www.washingtonpost.com/national/criminal-justice-election/2020/11/13/20186380-25d6-11eb-8672-c281c7a2c96e_story.html

[28] https://www.theguardian.com/us-news/2020/jun/07/minneapolis-city-council-defund-police-george-floyd

[29] https://www.nj.com/hudson/2020/05/could-jersey-city-get-a-police-oversight-board.html

decades and led calls for reform,[30] the current moment has forced many white Americans to examine their own role in contributing to racial injustice. Tyrone Beason, *'Something is not right.' George Floyd protests push white Americans to think about their privilege*, L.A. Times (June 28, 2020) (reporting that Floyd's death was "another blow to the illusions of safety, security and equality that many white people harbor about America" and have forced a recognition of the horrors of police brutality and the panic Black people experience in the presence of officers).[31] There is a new understanding among some white people that joining marches or being well-intentioned is not enough to root out systemic racism. *Id.*; *see also* Nancy Armour, *Noose in Bubba Wallace's garage strengthens resolve to fight racism*, USA Today (June 22, 2020).[32]

Amidst this national reckoning, police themselves have recognized the need to root out misconduct in their midst. In a

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[30] Indeed, the 1968 Newark rebellion was touched off by police brutally beating John Smith, a black cab driver. *See* Nancy Solomon, *40 Years On, Newark Re-Examines Painful Riot Past*, NPR News (July 14, 2007), https://www.npr.org/templates/story/story.php?storyId=11966375.

[31] https://www.latimes.com/politics/story/2020-06-28/white-voters-racism-reckoning-george-floyd-killing

[32] https://www.usatoday.com/story/sports/columnist/nancy-armour/2020/06/22/noose-bubba-wallaces-garage-strengthens-resolve-fight-racism/3234107001/

break from past practice, police officers and agencies around the country quickly condemned the actions of the Minneapolis police officers involved in the incident. Stefanie Dazio, *Police across US speak out against Minneapolis custody death*, Associated Press (May 29, 2020).[33] Previously, in response to deaths of Black people at the hands of police, law enforcement officers were reluctant to be critical. *Id.*

For their part, New Jersey law enforcement officials joined their colleagues across the country in expressing an eagerness to "reassess how cops do their jobs" and transform police culture. *See, e.g.,* Steve Janoski & Richard Cowen, *Policing must evolve after George Floyd killing, NJ cops say. But into what?*, NorthJersey.com (June 18, 2020);[34] *see also*, Edgardo Garcia, William Scott & Michel Moore, *After George Floyd Protests, Police Chiefs Say, "We Hear You"*, The Mercury News (June 21, 2020) (California police chiefs embrace discussion on alternatives "to sending police officers into situations where mental health, violence interruption, and harm reduction

[33] https://apnews.com/1fdb3e251898e1ca6285053304dfe8cf

[34] https://www.northjersey.com/story/news/new-jersey/2020/06/18/nj-cops-say-policing-must-evolve-after-george-floyd-killing/5338788002/

approaches by trained professionals in those disciplines may offer more effective community-centered resolutions").[35]

The Attorney General has responded to this historical moment by reaffirming his commitment to transforming policing in New Jersey. *See, e.g.,* Press Release, Office of the Attorney General, AG Grewal Outlines Process for Revising New Jersey's Use of Force Policy, (June 12, 2020) (referring to efforts to promote a culture of professionalism, accountability, and transparency).[36] He has signaled an interest in collaborating across constituencies to update the state's Use of Force policy and committed to listening to varied perspectives: "police officers, civil rights advocates, religious leaders, victims' rights organizations, and community members . . . [and] . . . those that have had negative experiences with law enforcement officers[,] because we are committed to getting this right." *Id*.

In light of neighboring New York's repeal of decades old statutory protections for police discipline records,[37] it follows

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[35] https://www.mercurynews.com/2020/06/21/opinion-after-george-floyd-protests-police-chiefs-say-we-hear-you/

[36] Available at https://www.nj.gov/oag/newsreleases20/pr20200612a.html.

[37] New York lawmakers have repealed "50-a," the state's statutory chapter that has shielded police misconduct from the public. For years, advocates have campaigned for its repeal, but had not been able to overcome the police union's opposition until the recent protests prompted legislative action. *See* Luis Ferre-Sadurni & Jesse McKinnley, *N.Y. State Moves to Check Police*

that New Jersey's chief law enforcement officer – whom advocates have called upon for greater transparency and accountability for decades, *supra,* Point I.B. – would reexamine this state's approach to transparency.

When Attorney General Grewal issued the directives at issue in this matter, he acknowledged that the longstanding practice of shielding the identity of police officers subject to major discipline "protect[ed] the few to the detriment of the many." Press Release, Office of the Attorney General, AG Grewal Issues Statewide Order Requiring Law Enforcement Agencies to Identify Officers Who Commit Serious Disciplinary Violations, (June 15, 2020).[38] As his office contended with the public's newly focused scrutiny on policing people of color, it was forced to reconsider its longstanding practice of allowing secrecy in police discipline. In response to the newest movement ignited by the deaths of Mr. Floyd and other Black individuals at the hands of police, the Attorney General has begun to shift away from secrecy and towards transparency, recognizing that community trust is undermined when police officers are able to hide their misconduct, their bias, and their violence from the public.

Conduct, N.Y. Times (June 13, 2020), https://www.nytimes.com/2020/06/12/nyregion/50a-repeal-police-floyd.html.

[38] Available at https://www.nj.gov/oag/newsreleases20/pr20200615a.html.

II. TRANSPARENCY IN POLICE DISCIPLINE PROMOTES PUBLIC SAFETY.

A. Discipline records, including historical records, provide the public with critical information about both officers and departments.

The police unions oppose the release of any disciplinary records, but focus on two particular concerns: first, that "major discipline" is often meted out merely for "administrative violations[.]" State Troopers Fraternal Association, *et al.*, *Open Letter to All New Jersey Citizens* (June 19, 2020) 2 ("*Open Letter*").[39] Second, although retired officers will suffer prejudice as a result of the release of disciplinary records, there exists no associated benefit for such disclosures. *Id.; see also* NCOBr 23 (arguing that transparency goals of the Attorney General are not advanced by releasing disciplinary records of retired troopers). Both claims appear overstated or false and certainly ignore the significant ways in which the public benefits from robust information about police misconduct.

A sampling of the discipline meted out in 2017 debunks the idea that "administrative violations" yield major discipline. New Jersey State Police Office of Professional Standards, *Internal Investigation and Disciplinary Process Annual Report*

[39] Available at http://nco1921.org/pdf/State-Police-Unions-Open-public-letter-6-19-20.pdf.

2017, 13-16.[40] An examination of the first listed behavior that produced major discipline is illustrative:

> Member admitted to acting in an official capacity to the discredit of the Division while on-duty for entering false information into the e-Daily system, displaying improper attitude and demeanor during a motor vehicle stop, operating troop transportation in an unsafe manner, and disobeying written and verbal orders by unauthorized changes to their schedule and improperly editing an e-Daily system entry. In addition the member used profanity during both a crash investigation and the processing of arrested subjects, and made improper entries into an evidence ledger. The member received a 60 day suspension.
>
> [*Id.* at 13.]

Within that synopsis one finds some behaviors that could plausibly be dismissed as "administrative violations": arguably, improper attitude and demeanor, unsafe driving, and the use of profanity do not diminish public confidence in law enforcement's ability to legitimately and fairly enforce the law. But members of the public have an unquestionable interest in learning about

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[40] Available at https://www.njsp.org/information/pdf/2017_OPS_Annual_Report.pdf. Although Attorney General Guidelines call for the public release of this information on an annual basis, the 2017 report is the most recent one available online. Office of the Attorney General, *Internal Affairs Policy and Procedure* 61 (Dec. 2019), ("[E]very agency shall submit to the County Prosecutor and publish on the agency's public website a brief synopsis of all complaints where a fine or suspension of ten days or more was assessed to an agency member.") This document is available at NCO Pa39-66.

officers who falsify records and taint evidence. Further, in light of proven racial bias in policing, "displaying improper attitude and demeanor during a motor vehicle stop," could indicate racist treatment by the officer based on the race of the motorist.[41]

Moreover, the police unions understate the significance of several incidents. For example, the police unions describe the troopers who provided certifications as "NJSP members who have had off-duty marital discord, [NCO]Pa177-78, 191-93; suffered from addiction while off-duty, [NCO]Pal73-74. . . ." NCOBr 22. A closer read of the certifications makes clear that the troopers were not sanctioned for "off-duty marital discord" but for acts of domestic violence and property damage (NCO Pa177; NCO Pa192); they were reprimanded not because they "suffered from addiction while off-duty" but because they drove under the influence (NCO Pa173; NCO Pa181-182). These are actions that can result in arrest for members of the public.

However, even if the police unions' basic contention – that some officers receive significant suspensions for minor

[41] Indeed, studies have shown that police officers are significantly less respectful and consistently ruder toward Black motorists during routine traffic stops than they are toward white drivers. *See* Rob Voight, *et al.*, *Language from police body camera footage shows racial disparities in officer respect*, Proceedings of the National Academy of Sciences of the United States of America (June 20, 2017), available at https://www.pnas.org/content/114/25/6521.

misbehavior, which they call “innocuous performance issues” (NCOBr 23) – were correct, the police unions’ conclusion that the public has no interest in learning the details of those cases would be mistaken. If some troopers receive 90-day suspensions for the significant misbehavior characterized above and other troopers received similar suspensions for simple administrative violations – bad language, and the like – it might not serve as a condemnation of the foul-mouthed troopers, but it would signal a disciplinary system that failed to identify and punish officers exhibiting the most problematic behavior. The public maintains an interest in learning about how departments punish officers for both serious misbehavior and for trivial rule violations so it can properly assess whether disciplinary systems are fair and effective.

The police unions also suggest that the public has no interest in learning about discipline imposed on retired officers. As discussed above, disciplinary information shines a light on both individual officers and institution-wide issues of fairness in discipline. The latter concern applies with equal force to retired officers. But, critically, the police unions ignore an important feature of New Jersey’s law enforcement employment scheme: unlike almost every other state, our state does not have a mechanism for the licensing or decertification of police officers. Alex Napoliello & S.P. Sullivan, NJ Advance

Media for NJ.com, *N.J. will track police use of force, require licensing cops, AG says as protests roil nation*, NJ.com (June 2, 2020) (acknowledging that "at least 43 other states [have] a licensing program for law enforcement officers").[42] As a result, officers who leave employment in one department are frequently hired in other departments. *See* Rukmini Callimachi, *9 Departments and Multiple Infractions for One New Jersey Police Officer*, N.Y. Times (June 24, 2020) (describing how, without licensing schemes, problematic officers can bounce from department to department).[43] In addition, retired law enforcement officers may rely on their experience to seek other positions of public trust, such as a sheriff, public safety director, or corrections administrator. In these roles it is critical for the public to understand the full scope of the individuals' history in law enforcement. This makes the public availability of police disciplinary records particularly important.

The affidavit of "Trooper 5" filed with the Appellate Division in the *State Troopers Non-Commissioned Officers Association* matter is instructive. That trooper, who received

[42] https://www.nj.com/politics/2020/06/nj-will-track-police-use-of-force-require-licensing-cops-ag-says-as-protests-roil-nation.html

[43] https://www.nytimes.com/2020/06/24/nyregion/new-jersey-police.html. Although the Attorney General has indicated a willingness to move forward with a licensing scheme, none has been created yet.

major discipline as a result of an alcohol-fueled verbal argument with his wife, where he damaged property and operated troop transportation after consuming alcohol, has since resigned from the New Jersey State Police to pursue a private sector job. Affidavit of Trooper 5 ¶¶ 4, 14; NCO Pa191-192. He certifies that he "was assured that by entering a plea, the matter would remain confidential and have no impact on [him] in the future, unless [he] returned to the employment of the New Jersey State Police." *Id.* at ¶ 10. If the State Police keeps secret disciplinary records of troopers no longer employed by them, communities will have no assurance that former troopers hired into other positions of trust do not have records of past misconduct.

A system for licensing police officers helps build accountability. *See generally* Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, The Atlantic (Apr. 9, 2017);[44] Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 St. Louis Univ. L. J. 541-579 (2001).

Even where past misconduct is insufficient to justify decertification, and perhaps also not enough to warrant a decision not to hire a police officer, communities still deserve

[44] https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/

to understand the disciplinary records of officers who patrol their neighborhoods. Information about the discipline of police officers – retired or not – serves to enlighten people about key functions of their government. After all, our state has long recognized that "knowledge is power in a democracy, and that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." *Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities*, 207 N.J. 489, 502 (2011).

B. Although police unions resist it, transparency promotes confidence in police, which in turn promotes community trust in law enforcement institutions.

Recently, the U.S. Commission on Civil Rights called together policing experts to explore, among other issues, oversight and accountability of law enforcement. U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018) ("U.S. Commission on Civil Rights").[45] Scholars testified that the "absence of public information [about discipline] allows negative perceptions, and the belief that the police generally are not responsive to the complaints[,] to fester." *Id.* at 61. Ultimately, "the public has a right to know what our public officials are doing, and this is

[45] Available at https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf.

especially true with our police officers, who have the power to shoot to kill, use force, and deprive people of their liberty through stop or arrest." *Id.*

Transparency serves as a necessary (though not sufficient) element of efforts to build public trust. Trust for the police as an institution, which is low among all Americans, reaches its nadir among Black Americans. Congressional Research Service, *Public Trust and Law Enforcement: A Discussion for Policymakers* (Dec. 13, 2018), Page 2, Table 1 ("Congressional Research Service").[46] According to Gallup, which has been tracking confidence in institutions for decades, in July 2020, only 56 percent of white Americans reported having "quite a lot" or "a great deal" of confidence in police. Jeffrey M. Jones, *Black, White Adults' Confidence Diverges Most on Police*, Gallup (Aug. 12, 2020).[47] Among Black Americans, that number drops to a mere 19 percent. *Id.*

This distrust comes with profound consequences. Community trust "is the key to effective policing" and the lack of it undermines the ability of police officers to do their jobs successfully. *See* International Association of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve*, 7

[46] Available at https://fas.org/sgp/crs/misc/R43904.pdf.

[47] https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx.

(Jan. 2014).[48] "Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have the legitimate authority to tell them what to do." President's Taskforce on 21st Century Policing, *Final Report*, 9-10 (May 2015).[49] Perceptions of legitimacy only attach when the public "believe[s police] are acting in procedurally just ways." *Id.* Put differently, a community "is more willing to cooperate with and engage those [legal] authorities because it believes that it shares a common set of interests and values with the police." *Id.* at 10, citing Tom Tyler, Jonathon Jackson & Ben Bradford, *Procedural Justice and Cooperation*, Encyclopedia of Criminology and Criminal Justice 4011–4024 (Gerben Bruinsma & David Weisburd eds., Springer 2014); *see also* Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 Ohio St. J. Crim. L. 123-140 (2008) (discussing relationship between perceptions of legitimacy and efficacy in the poling context). "Although organizations can be more or less dependent on legitimacy and public trust for their effectiveness and survival, police departments would appear to

[48] Available at https://www.theiacp.org/sites/default/files/all/b/BuildingTrust.pdf.

[49] Available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

be particularly sensitive, given the often very high visibility of their actions and their dependence on public support." Brian Jackson, *Respect and Legitimacy — A Two-Way Street: Strengthening Trust Between Police and the Public in an Era of Increasing Transparency*, RAND Corp. 4 (2015).[50]

In response to the Attorney General's June 15, 2020, decision to allow for the release of disciplinary records in instances where major discipline had been imposed, Petitioner law enforcement unions put out a statement explaining their position: "The retrospective attachment of Troopers' names and republishing old annual reports serves absolutely no legitimate purpose other than to harass, embarrass, and rehash past incidents during a time of severe anti-law enforcement sentiment." *Open Letter* at 2. The police unions are wrong. The Attorney General's policy changes represents a small, but important step forward in providing transparency.

Where the public cannot learn about disciplinary action, it cannot serve its vital role as a "check" on government. *See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003) ("A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the

[50] Available at https://www.rand.org/pubs/perspectives/PE154.html.

core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights."); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.").

The converse is also true: if police discipline processes are transparent and fair, then people are more likely to cooperate with police officers; that, of course, promotes public safety. Scholars confirm that transparency advances trust, which in turn improves safety. *See*, *e.g.*, Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 No. 6 Crim. L. Bulletin Art (2009) ("Making information about police misconduct public ensures trust in law enforcement agencies"); Katharine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 Stan. L & Pol'y Rev. 109, 120 (2017) ("[I]ncreasing transparency by publicly disclosing misconduct records should increase community faith and make police officers more effective in protecting their community."); Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public*, 22 CUNY L. Rev. 148, 166

(Winter 2019) (“[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective.”).

Broad distrust of police officers, particularly in the Black community, will not dissipate with requests from law enforcement to “trust us.” After all, “[s]unlight is the greatest disinfectant when the government acts in dark corners.” *Paff v. Ocean Cnty. Prosecutor’s Off.*, 235 N.J. 1, 34 (2018) (Albin, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), (quoting Louis Brandeis, *What Publicity Can Do*, *in Other People’s Money and How the Bankers Use It* 62 (National Home Library Foundation ed. 1933)). Justice Albin’s explanation that, “[t]he public – particularly marginalized communities – will have greater trust in the police when law enforcement activities are transparent. . . ” *Paff*, 235 N.J. at 36 (Albin, J., dissenting), applies with equal force to disciplinary records.

C. Other states have successfully made police discipline records public without inviting the negative consequences about which the police unions warn.

Appellant union and the police unions in the other cases suggest that their members will suffer invasions of privacy, and even risks to their personal safety, if disciplinary records are made public. As discussed above (Point II, A, *supra*), the police unions ignore the societal benefits that flow from transparency.

As evidenced by experience in other states, the police unions also overstate the risk of negative consequences.

Even before the murder of George Floyd, and the increased attention to police transparency, thirteen states made records of police discipline generally available to the public. For years, these states have struck an appropriate balance – allowing disclosure of discipline records, while protecting information about medical conditions and the identity of victims.

For example, in Alabama, then-State Attorney General Jeff Sessions explained that "in general, applications, disciplinary actions, and memoranda of reprimand are documents reasonably necessary to conduct business, and thus subject to disclosure. . . ." Alabama Attorney General Opinion 96-00003, 4(1996).[51] On the other hand, "[a]n employee's medical history, confidential recommendations for employment, and drug or alcohol testing results will, in most cases, fall under the sensitive personnel records exception set out in [case law]." *Id.* Under Alabama's public record law, public officials are not to disclose documents that are "expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public. .

[51] Available at https://www.alabamaag.gov/Documents/opin/96-00003.pdf.

. .” Code of Ala. § 36-12-40. Thus, the Attorney General in Alabama decided almost 25 years ago that the disclosure of disciplinary records was not detrimental to the public interest.

In Arizona, once an investigation is complete, Ariz. Rev. Stat. § 38-1109(A), and the officer has exhausted any appeals, Ariz. Rev. Stat. § 38-1109(B), records “that are reasonably necessary or appropriate to maintain an accurate knowledge of disciplinary actions, including the employee responses to all disciplinary actions, involving public officers or employees of the public body” shall generally “be open to inspection and copying.” Ariz. Rev. Stat. § 39-128(A).

Under Connecticut’s Freedom of Information Act, Conn. Gen. Stat. § 1-210, custodians need not disclose “[p]ersonnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy.” Conn. Gen. Stat. § 1-210(b)(2). That exception to transparency has been narrowly construed. To claim that exemption, custodians “must meet a twofold burden of proof . . . . First, they must establish that the files in question are within the categories of files protected by the exemption, that is, personnel, medical or ‘similar’ files.” *Perkins v. Freedom of Info. Comm’n*, 228 Conn. 158, 168 (Conn. 1993). Custodians must also demonstrate “that disclosure of the records would constitute an invasion of personal privacy.” *Id.* (internal quotations omitted). The

Supreme Court of Connecticut determined that "the invasion of personal privacy exception . . . precludes disclosure . . . only when the information sought by a request does not pertain to legitimate matters of public concern and is highly offensive to a reasonable person." *Id.* at 175. Thus, police discipline records are routinely released under Connecticut law. WNYC, *Is Police Misconduct a Secret in Your State?*[52]

Washington takes a similar approach. Under their public records law, a person's "right to privacy," is "violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." Rev. Code Wash. (ARCW) § 42.56.050. Although the State exempts from disclosure "unsubstantiated or false accusation[s]" of, for example, sexual misconduct that did not "result[] in any form of discipline" *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199 (Wash. 2008), it allows the disclosure of less-incendiary allegations – such as the creation of a hostile work-place environment – and those that are substantiated. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 756 (Wash. 2009).

Statutes in Florida, Georgia, Maine, North Dakota and Wisconsin make disciplinary records public once an investigation

[52] https://project.wnyc.org/disciplinary-records/ (last accessed Dec. 14, 2020).

has been completed. *See* Fla. Stat. § 119.071(k) ("A complaint of misconduct . . . is confidential and exempt . . . [from disclosure] until the investigation ceases to be active. . . ."); Ga. Code Ann. § 50-18-72(a)(8) ("Records . . . related to the suspension, firing, or investigation of complaints against public officers or employees [shall not be made public] until . . . the investigation is . . . concluded or terminated"); Maine Rev. Stat. § 503(1)(B)(5) (making public "final written decision relating to [disciplinary] action [for county employees]. . . after the decision is completed if it imposes or upholds discipline" and explaining that the "decision must state the conduct or other facts on the basis of which disciplinary action is being imposed"); Maine Rev. Stat. § 2702(1)(B)(5) (same, for municipal employees); Maine Rev. Stat. § 7070(2)(E) (same, for state employees); N.D. Cent. Code, § 44-04-18.1(6) ("Records relating to a public entity's internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint."); Wis. Stat. § 19.36(10)(b) (exempting from public disclosure only "[i]nformation relating to the *current* investigation of a possible criminal offense or possible misconduct connected with employment by an employee *prior to disposition* of the investigation") (emphasis added).

In Minnesota, Minn. Stat. § 13.43(a)(4) provides that "the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action" is a public record subject to disclosure. *Id.* Additionally, statutes make public "the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body." Minn. Stat. § 13.43(a)(5).

In Ohio, case law confirms that police disciplinary records are public records subject to disclosure under Ohio's public records law. *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St. 3d 39, 41 (Ohio 2000).

Finally, in Utah, their public records law provides that "records that would disclose information relating to formal charges or disciplinary actions against a past or present governmental entity employee[,]" Utah Code Ann. 63G-2-301(3)(o), shall be public if "the disciplinary action has been completed and all time periods for administrative appeal have expired; and . . . the charges on which the disciplinary action was based were sustained[.]" Utah Code Ann. 63G-2-301(3)(o)(i) and (ii).

Additionally, in at least 15 other states, some disciplinary records are available for public inspection. *See*

WNYC, *Is Police Misconduct a Secret in Your State?* In short, despite the police unions' suggestion that the sky will fall if the public gets access to some police disciplinary files, there exists no evidence from the dozens of states that do allow access to suggest that such a result is likely. Indeed, as the U.S. Commission on Civil Rights noted, despite concerns about the "implications for individual privacy of the officers and complainants . . . , some states, such as Florida and Illinois, regularly release officer disciplinary files to the public without violating the complainants' or victims' rights." U.S. Commission on Civil Rights at 61.

D. The Public Interest in Disclosure of Police Misconduct Records Outweighs Any Purported Privacy Interests.

As discussed throughout this brief, the public's interest in transparency regarding police discipline is overwhelming because transparency is fundamental to public safety and community trust. The public's interest in transparency reaches its peak when it seeks accountability from those it has entrusted with the power to use force – including lethal force – against fellow residents.

In addition to advocating for police transparency, several of the *amici* also advocate for privacy, including regarding information related to health and other sensitive information. When weighing the interests at stake in the release of disciplinary records, *amici* are united in their belief that the

public's enormous interest dwarfs any speculative rights to privacy.

Importantly, there is no substantive due process right to shield information about one's misconduct. Several of the Petitioners suggest that revealing their identities implicates the disclosure of health information.[53] *Amici* note that some of the examples demonstrate that officers were charged with alcohol-related offenses and thus their problematic use of alcohol has already been publicly revealed.[54] *See, e.g.,* Affidavit of Trooper 3, NCO Pa173 (noting that the trooper "pleaded guilty to driving while intoxicated and failure to take a breathalyzer"). In any event, if the information that is to be

[53] Before the Appellate Division, the State Troopers Fraternal Association makes unsupported claims that "medical records" could be revealed. STFABr 48. "Medical records" typically are in the possession of healthcare providers, health insurers, or the individual. *See generally* 45 CFR § 164.501, -524. Even if an officer shared medical records with the New Jersey State Police, *amici* have identified nothing in the directives that suggest the release of such records is an issue before the Court.

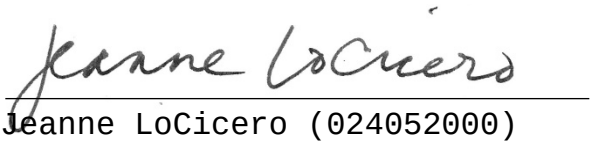
[54] While several police unions argue that the release of this information will reveal alcohol dependency, *amici* note that it is not necessarily clear that all alcohol-related misconduct stems from alcohol dependency. "Alcohol dependence" was a psychiatric diagnosis that is now referred to as Alcohol Use Disorder. See National Institute of Alcohol Abuse and Alcoholism, *Alcohol Use Disorder: A Comparison Between DSM-IV and DSM-5,* available at https://www.niaaa.nih.gov/sites/default/files/DSMfact.pdf. If an officer was charged with operating a vehicle while under the influence, the public has no way of discerning whether it was a result of a diagnosis or an isolated incident.

released pursuant to the directive identifies a health condition, that does not justify a decision to shield identities from the public; it only counsels that a redaction may be appropriate, a process that the Office of Attorney General is familiar with through its obligations under the Open Public Records Act.

CONCLUSION

For decades, communities have pushed for transparency regarding police misconduct and police unions have successfully used their political power to thwart it. Now, the Attorney General has offered a small step towards accountability. The public should not be required to wait any longer. The Court should reject the police unions' request that law enforcement officers be treated differently than other regulated professions. And the Court certainly should consider the profound harm that comes to the public when police avoid transparency.

Respectfully submitted,



Jeanne LoCicero (024052000)
Alexander Shalom
Karen Thompson
Molly K.C. Linhorst
American Civil Liberties Union
of New Jersey Foundation
570 Broad Street, 11th floor
P.O. Box 32159
Newark, NJ 07102
973-854-1715
jlocicero@aclu-nj.org

Counsel for *amici curiae*

Dated: December 14, 2020

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

In re Attorney General Law Enforcement Directive Nos. 2020-5 and 2020-6 (A-26/27/28/29/30-20) (085017)

Argued March 2, 2021 -- Decided June 7, 2021

RABNER, C.J., writing for a unanimous Court.

In June 2020, weeks after George Floyd was killed at the hands of a Minneapolis Police Officer, the Attorney General for New Jersey issued two Directives. They call for the release of the names of law enforcement officers who commit disciplinary violations that result in the imposition of "major discipline" -- termination, demotion, or a suspension of more than five days. A summary of the misconduct and the sanction imposed must also be disclosed. In this appeal, the Court considers challenges brought against the Directives by five groups representing state and local officers.

Directive 2020-5 applies to all law enforcement agencies in the State, including local police departments; Directive 2020-6 applies to the State Police and other agencies within the Department of Law and Public Safety (Department). Both Directives encompass all findings of major discipline after January 1, 2020. In addition, for the State Police and other agencies within the Department, officers subjected to major discipline dating back twenty years would be identified publicly. The Directives mark a sharp change in practice. Previously, the Attorney General fought to shield the identities of law enforcement officers disciplined for serious misconduct.

Appellants and intervenors challenged the Directives on a number of grounds. The Appellate Division upheld the Directives against the parties' facial challenge. 465 N.J. Super. 111, 128-29, 162 (App. Div. 2020). The court concluded that the Attorney General had the authority to issue the Directives and found that the Directives did not conflict with the Open Public Records Act (OPRA) or other authorities relating to the confidentiality of personnel records. Id. at 140-48. The court also found the retroactive nature of the Directives did not run counter to ex post facto principles. Id. at 149.

In light of the limited record before it and the fact that appellants brought only a facial challenge to the Directives, the Appellate Division declined to address any contract claims or related arguments based on promissory and equitable estoppel, id. at 153-54, leaving open the possibility of individual as-applied challenges, id. at 154-55.

The Appellate Division found that the Directives did not violate constitutional guarantees of due process, id. at 156-57, or equal protection, id. at 157-59. The court also rejected claims that the Directives violate the Administrative Procedure Act (APA), id. at 159-60, and that they impair appellants' right to contract and violate their constitutional right to collective negotiations, id. at 160-61. Finally, the appellate court concluded the Directives are not arbitrary, capricious, unreasonable, or against public policy. Id. at 161.

The Court granted appellants' petitions for certification. 244 N.J. 447 (2020).

HELD: *The Attorney General had the authority to issue the Directives, which satisfy the deferential standard of review for final agency decisions. The Directives are designed to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the disciplinary process, and to identify repeat offenders who may try to move from one sensitive position to another. In short, the Directives are consistent with legislative policies and rest on a reasonable basis.

*The Court does not find merit in the bulk of the remaining challenges but explains that one claim requires more careful attention: Officers subjected to major discipline for the past twenty years say they were promised that their names would not be released, and that they relied on that promise in resolving disciplinary accusations. In essence, they ask the State to stand by promises they claim were made throughout the prior twenty years. To resolve that serious issue, a judge will need to hear and evaluate testimony and decide if the elements of the doctrine of promissory estoppel have been met for disciplinary matters settled before the Directives were announced. The Court offers guidance for that process and, in a separate order, designates a single Judge of the Superior Court to conduct the hearing described in section VI.B of the opinion.

*The identities of officers subject to major discipline since the Directives were issued in June 2020 may be disclosed; going forward, future disciplinary sanctions can be disclosed in the same manner.

1. The Attorney General has broad authority over criminal justice matters, including "the general supervision of criminal justice," N.J.S.A. 52:17B-98, and the power to "adopt rules and regulations for the efficient conduct of the work and general administration of the [D]epartment, its officers and employees," N.J.S.A. 52:17B-4(d). Over the years, multiple Attorneys General have exercised that power to establish policies for the internal affairs review process through the issuance of Internal Affairs Policy and Procedures manuals (IAPPs). The first IAPP, in 1991, established a comprehensive set of procedures to address allegations of officer misconduct. Five years later, the Legislature directed every law enforcement agency in the State to adopt guidelines consistent with the IAPP. N.J.S.A. 40A:14-181. Since 1991, each iteration of the IAPP has provided that the progress of investigations and contents of case files were confidential but could be released in limited circumstances. (pp. 20-22)

2. Directives 2020-5 and 2020-6 altered historical practice by requiring that officers subject to major discipline be identified publicly. Directive 2020-5 applies not only prospectively but also for at least five months before it was issued. In addition, it states that "nothing . . . prevents agencies from releasing similar information regarding historical incidents of officer misconduct." And Directive 2020-6, beyond its prospective application, requires the agencies to which it applies to "publish the names of any officers who have been subject to serious discipline in the past twenty years." (pp. 22-24)

3. Under OPRA, government records are subject to disclosure unless the law exempts them from access. Appellants highlight section 10 of the law, which limits the disclosure of personnel and pension records. See N.J.S.A. 47:1A-10. Section 10, however, contains an important exception: "[P]ersonnel or pension records . . . shall be accessible when required to be disclosed by another law . . . ." Ibid. (emphasis added). A regulation the Department adopted in 2014 provides that certain records "shall not be considered government records subject to public access" under OPRA, but this regulation does not apply to "records enumerated in N.J.S.A. 47:1A-10 as available for public access." N.J.A.C. 13:1E-3.2(a)(4). In other words, a record subject to disclosure under section 10 of OPRA is likewise subject to disclosure under the regulation. The same exception is embedded in Executive Order 11, issued by Governor Byrne: "Except as otherwise provided by law . . . an instrumentality of government shall not disclose . . . personnel or pension records of an individual." (emphasis added). (pp. 24-26)

4. Based on their statutory authority, see N.J.S.A. 52:17B-98 and -4(d), Attorneys General have issued directives that govern the disciplinary process. Attorney General directives relating to the administration of law enforcement have the "force of law." See N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 565 (2017). The IAPP, in particular, carries the force of law for State and local law enforcement. Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 100-01 (2020). Moreover, the Legislature enacted a separate statute that underscores the force of the IAPP. N.J.S.A. 40A:14-181 embraces the Attorney General's policy on internal affairs matters by directing law enforcement agencies throughout the state to adopt guidelines consistent with the IAPP. And the policy in effect at the time section 181 was enacted -- the 1992 IAPP -- declared that police executives, like the Attorney General, could release disciplinary records. The Directives therefore do not conflict with OPRA, N.J.A.C. 13:1E-3.2(a), or Executive Order 11. (pp. 27-28)

5. Courts apply a deferential standard to final agency actions and will not overturn them unless they are arbitrary, capricious, or unreasonable. For actions like the Directives, judicial intervention is limited to those rare circumstances in which it is clear the agency action is inconsistent with its mandate. The Legislature empowered the Attorney General to issue directives. To determine whether a particular directive is arbitrary, capricious, or unreasonable, courts consider whether "there is any fair argument in support of the course taken." Flanagan v. Dep't of Civ. Serv., 29 N.J. 1, 12 (1959). (pp. 29-33)

6. The Court reviews the Directives, which detail the Attorney General's justification for releasing the names of officers subject to major discipline. The Court also reviews appellants' concerns and arguments about the wisdom and consequences of the Directives. Disagreement over a policy, however, does not make it arbitrary, capricious, or unreasonable. If an administrative action is consistent with legislative policies, rests on a reasonable basis, reflects careful consideration of the issues, and can otherwise satisfy the standard for appellate scrutiny, the policy should be upheld. Here, the Attorney General exercised authority the Legislature placed in his office to develop and revise disciplinary policies. He acted to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the internal affairs process, and to prevent officers from evading the consequences of their misconduct. The Attorney General's reasoned bases for acting were fully consistent with the Department's mandate. The Directives implement a practice that is common in other professions. Once again, thoughtful concerns in opposition to a new policy are not fatal to administrative action. The Attorney General's decision to release the names of law enforcement officers subject to major discipline is consistent with his delegated authority and grounded in reason. It is not arbitrary, capricious, or unreasonable. (pp. 33-40)

7. The Ex Post Facto Clause is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. The Directives do none of those things. Nor do they reflect a change in the law. The Attorney General's authority is grounded in statutes enacted decades ago, and the Attorney General has advised officers for more than twenty years that internal affairs records might be released. Insofar as appellants challenge the Attorney General's exercise of his discretionary authority to change longstanding practice, their claim emphasizes estoppel principles. (pp. 40-41)

8. Appellants argue that the Directives violate the doctrine of promissory estoppel; they also rely on the related theory of equitable estoppel. The Court reviews the elements of those claims and notes that appellants submitted multiple certifications to demonstrate that the Office of the Attorney General made clear promises of confidentiality throughout the disciplinary process. (pp. 41-43)

9. Although the record is incomplete, it raises significant concerns in that it suggests that officers who agreed to major discipline received assurances of confidentiality. Each IAPP stresses that records of internal affairs investigations are confidential and that files must be "clearly marked as confidential." In addition, a series of certifications in the record from the Superintendent of the State Police and others assert that for many years, the internal affairs process has been replete with promises of confidentiality and reassurances from state officials to officers who agreed to discipline. Representations made by the Attorney General in a 2018 brief in another matter appear to validate part of the certifications before the Court in this case. The disclosure of disciplinary records in criminal cases and in response to civil discovery requests does not undermine appellants' estoppel argument. (pp. 43-50)

10. The Court exercises its supervisory authority to establish a process for consideration of the estoppel claims raised by officers who settled their disciplinary actions, which will help ensure that relevant issues are resolved in a uniform and efficient manner. In section VI.B of the opinion, the Court details that process for State Troopers, which will begin with a broad-ranging evidentiary hearing before a single judge. The hearing should explore the practice of the State Police relating to disciplinary matters, and the question of confidentiality, in particular, before the Directives were issued. If the court finds that promises of confidentiality were made and relied on consistent with the appropriate legal standards, it could bar the release of names of law enforcement officers subject to Directive 2020-6 for disciplinary matters settled before June 19, 2020. If the record does not support such a conclusion for the entire group of officers, the court's more limited findings may be incorporated and made part of the record in individual challenges that will likely follow. The Court provides guidance for those challenges, including that officers will have 45 days to file an action upon receiving notice of proposed disclosure by the Attorney General. (pp. 50-53)

11. The Court does not separately address potential challenges that may arise if or when local chief law enforcement executives decide to release names of officers involved in historical incidents of misconduct. If parties seek to challenge orders by chief law enforcement executives, pursuant to Directive 2020-5, on estoppel grounds, they may file an application with the Assignment Judge in their respective vicinages. Assignment Judges have the authority to set up a process similar to the one outlined for State Troopers -- a broad-based evidentiary hearing about an agency's disciplinary practices, followed by individual as-applied challenges, if necessary. The procedures outlined in section VI.B for as-applied challenges brought by Troopers would apply. (pp. 53-54)

12. For major discipline imposed after the Attorney General issued the Directives, officers can expect their identities will be released to the public. They may challenge disciplinary findings in the ordinary course. The framework outlined in section VI.B applies only to historical cases of major discipline, imposed before the Directives were issued, in which officers challenge the release of their names on estoppel grounds. (pp. 54-55)

13. Appellants claim the Directives violate their rights to substantive and procedural due process and equal protection; run afoul of the APA; impair their constitutional right to contract; and violate their constitutional right to collective negotiations. As to those points, the Court affirms the judgment of the Appellate Division largely for the reasons stated in Judge Accurso's thoughtful opinion. See 465 N.J. Super. at 155-61. (p. 55)

The judgment of the Appellate Division is AFFIRMED AS MODIFIED.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-26/27/28/29/30 September Term 2020

085017

In re Attorney General
Law Enforcement Directive
Nos. 2020-5 and 2020-6

On certification to the Superior Court,
Appellate Division, whose opinion is reported at
465 N.J. Super. 111 (App. Div. 2020).

Argued	Decided
March 2, 2021	June 7, 2021

Kevin D. Jarvis argued the cause for appellant New Jersey Law Enforcement Superior Officers Association (O'Brien, Belland & Bushinsky, attorneys; Kevin D. Jarvis and Matthew B. Madsen, on the briefs).

James M. Mets argued the cause for appellant State Troopers Fraternal Association of New Jersey (Mets Schiro & McGovern and Markman & Cannan, attorneys; James M. Mets and Robert R. Cannan, of counsel and on the briefs, and Brian J. Manetta, on the briefs).

Katherine Hartman argued the cause for appellants State Troopers Non-Commissioned Officers Association of New Jersey and State Troopers Superior Officers Association of New Jersey, and their current respective presidents, Pete J. Stilianessis and Richard Roberts (Attorneys Hartman, Chartered, Law Offices of Robert A. Ebberup, Law Office of D. John McAusland, and Loccke, Correia & Bukosky, attorneys; Katherine D. Hartman, Mark A. Gulbranson, Jr., Robert A. Ebberup, D. John McAusland, and Michael A. Bukosky, on the briefs).

Matthew Areman argued the cause for appellants New Jersey State Policemen's Benevolent Association and New Jersey State Lodge of the Fraternal Order of Police and their current respective presidents, Patrick Colligan and Robert W. Fox (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys; and Markowitz & Richman, attorneys; Paul L. Kleinbaum, Craig A. Long, and Matthew Areman, on the briefs).

Frank M. Crivelli argued the cause for appellants Policemen's Benevolent Association Local Number 105, Policemen's Benevolent Association Local Number 383, Policemen's Benevolent Association Local 383A, Policemen's Benevolent Association Local 383B, and the New Jersey Law Enforcement Supervisors Association (Crivelli & Barbati, attorneys; Frank M. Crivelli, on the briefs).

Jeremy Feigenbaum, State Solicitor, argued the cause for respondent Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Jeremy Feigenbaum and Jane C. Schuster, Assistant Attorney General, of counsel and on the briefs, and Christopher Weber, Sean P. Havern, Patrick Jhoo, Brandon C. Simmons, Emily K. Wanger, and Emily Marie Bisnauth, Deputy Attorneys General, on the briefs).

Vito A. Gagliardi, Jr. argued the cause for amicus curiae New Jersey State Association of Chiefs of Police (Porzio Bromberg & Newman, attorneys; Vito A. Gagliardi, Jr., of counsel and on the brief, and David L. Disler and Thomas J. Reilly, on the brief).

Joseph E. Krakora, Public Defender, argued the cause for amici curiae Public Defender of New Jersey and Association of Criminal Defense Lawyers of New Jersey (Joseph E. Krakora, Public Defender, attorney; and Gibbons, attorneys; Joseph E. Krakora and Lawrence S. Lustberg, on the brief).

Alexander Shalom argued the cause for amici curiae American Civil Liberties Union of New Jersey, Bayard Rustin Center for Social Justice, Cherry Hill Women's Center, Ethical Culture Society of Bergen County, Fair Share Housing Center, Faith in New Jersey, Housing and Community Development Network of New Jersey, Latino Action Network, LatinoJustice PRLDEF, Legal Advocacy Project of UU FaithAction of New Jersey, Libertarians for Transparent Government, NAACP Newark, National Association for the Advancement of Colored People New Jersey State Conference, National Organization for Women of New Jersey, Newark Communities for Accountable Policing, New Jersey Alliance for Immigrant Justice, New Jersey Clergy Coalition for Justice, New Jersey Coalition Against Sexual Assault, New Jersey Institute for Social Justice, New Jersey Prison Justice Watch, Partners for Women and Justice, People's Organization for Progress, Salvation and Social Justice, Service Employees International Union Local 32BJ, SPAN Parent Advocacy Network, Volunteer Lawyers for Justice, Women Who Never Give Up, Inc. (American Civil Liberties Union of New Jersey Foundation; attorneys; Alexander Shalom, Jeanne LoCicero, Karen Thompson, and Molly K.C. Linhorst, on the brief).

CJ Griffin argued the cause for amici curiae National Coalition of Latino Officers and Law Enforcement Action Partnership (Pashman Stein Walder Hayden, attorneys; CJ Griffin, on the brief).

Bruce S. Rosen submitted a brief on behalf of amicus curiae Reporters Committee for Freedom of the Press (McCusker, Anselmi, Rosen & Carvelli; attorneys; Bruce S. Rosen, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

In June 2020, weeks after George Floyd was killed at the hands of a Minneapolis Police Officer, the Attorney General for New Jersey issued two Directives. They call for the release of the names of law enforcement officers who commit disciplinary violations that result in the imposition of "major discipline" -- termination, demotion, or a suspension of more than five days. A summary of the misconduct and the sanction imposed must also be disclosed.

One Directive applies to all law enforcement agencies in the State, including local police departments; the other applies to the State Police and other agencies within the Department of Law and Public Safety (Department). Both Directives encompass all findings of major discipline after January 1, 2020. In addition, for the State Police and other agencies within the Department, officers subjected to major discipline dating back twenty years would be identified publicly.

The Directives mark a sharp change in practice. Previously, the Attorney General fought to shield the identities of law enforcement officers disciplined for serious misconduct.

Five groups representing state and local officers challenged the Directives on multiple grounds. In a comprehensive opinion, the Appellate Division rejected their facial challenge to the Directives. In re Att'y Gen. L.

Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 162 (App. Div. 2020). We do as well.

We find that the Attorney General had the authority to issue the Directives. In evaluating them, appellate review of final agency decisions, which the Directives represent, is limited to whether an action is arbitrary, capricious, unreasonable, or contrary to public policy. See In re State & Sch. Emps.' Health Benefits Comm'ns' Implementation of Yucht, 233 N.J. 267, 279 (2018).

The challengers present a number of concerns; yet, in our view, the Directives satisfy the deferential standard of review. They are designed to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the disciplinary process, and to identify repeat offenders who may try to move from one sensitive position to another. In short, the Directives are consistent with legislative policies and rest on a reasonable basis.

We do not find merit in the bulk of the remaining challenges. One claim, however, requires more careful attention. Going forward, officers can expect that their names will be disclosed if they commit acts that result in major discipline. Officers subjected to that level of discipline for the past twenty years, however, present a straightforward argument: they say they

were promised that their names would not be released, and that they relied on that promise in resolving disciplinary accusations. The officers present a number of certifications in support of that claim, including one from the former Superintendent of the State Police. In essence, they ask the State to stand by promises they claim were made throughout the prior twenty years.

To resolve that serious issue, a judge will need to hear and evaluate testimony and decide if the elements of the doctrine of promissory estoppel have been met. To establish an orderly process for potentially hundreds of future proceedings, we offer guidance for disciplinary cases resolved up to twenty years before the Directives were issued.

A single trial judge will be designated to hear testimony that could apply to all of the challenges. The judge's ruling might resolve the claim as a whole; if not, the record created at the hearing can be used in individual as-applied challenges that State Troopers and others can pursue afterward. A similar process can be used in the event local officials choose to release historical incidents of serious misconduct.

To be clear, that process will apply only to disciplinary matters settled before the Directives were announced. The Attorney General had the right to change course and direct that details of future serious disciplinary matters -- including the names of the officers disciplined -- will be revealed to the public.

That practice is routine in other professions and shines light on both the overall disciplinary process and individual wrongdoing. The identities of officers subject to major discipline since the Directives were issued in June 2020 may be disclosed; going forward, future disciplinary sanctions can be disclosed in the same manner.

We therefore modify and affirm the judgment of the Appellate Division and remand for further proceedings consistent with this opinion.

I.

George Floyd's death on May 25, 2020 prompted nationwide protests and calls for greater accountability of police officers. Several weeks later, New Jersey Attorney General Gurbir S. Grewal issued two directives that require the release of the names of law enforcement officers who receive, and have received, major discipline. See Attorney General, Directive Requiring Public Disclosure of the Identities of Officers Who Commit Serious Disciplinary Violations (June 15, 2020) (Directive 2020-5); Attorney General, Directive Requiring Public Disclosure of the Identities of Department's Officers Who Committed Serious Disciplinary Violations Since 2000 (June 19, 2020) (Directive 2020-6).

As noted above, Directives 2020-5 and 2020-6 require law enforcement agencies to publish summaries of complaints against law enforcement officers

that result in an officer's termination, demotion, or suspension for more than five days. Each officer's identity, along with the sanction imposed, must be disclosed as well.

Directive 2020-5 applies to all local and county law enforcement. The Directive required each agency to publish its first report by December 31, 2020, covering disciplinary actions for the prior twelve months. Agencies could choose to disclose historical incidents of misconduct as well.

Directive 2020-6 applies to three agencies in the Department: the New Jersey State Police; Division of Criminal Justice; and Juvenile Justice Commission. The Directive required each agency to disclose, no later than July 15, 2020, the same information dating back to January 1, 2000: the names of officers subject to major discipline; a synopsis of their misconduct; and the sanction imposed. Under the Directive, each agency must give at least seven days' prior notice before publication to each officer, "whenever possible." For retired employees, the agencies must "make reasonable efforts to contact the officer[s] at their last known residential address, email address, or phone number."

The Attorney General stated that he issued the Directives pursuant to his authority to provide for the "general supervision of criminal justice" as the

State's chief law enforcement officer. The Directives and their rationale are discussed in greater detail below.

Five groups filed a facial challenge to the Directives: the State Troopers Fraternal Association of New Jersey and, as intervenors, the Association of Former New Jersey State Troopers, the New Jersey Former Troopers Heritage Foundation, Inc., and Former Trooper Members and FTA Members No. 1 & 2; the State Troopers Non-Commissioned Officers Association of New Jersey, the State Troopers Superior Officers Association of New Jersey, and their respective presidents, Pete J. Stilianessis and Richard Roberts; Policemen's Benevolent Association (PBA) Local Number 105, PBA Local Number 383, PBA Local Number 383A, PBA Local Number 383B, and the New Jersey Law Enforcement Supervisors Association; the New Jersey Superior Officers Law Enforcement Association (NJSOA); and the New Jersey State Policemen's Benevolent Association, the New Jersey State Lodge of the Fraternal Order of Police, and their respective presidents, Patrick Colligan and Robert W. Fox.

Appellants and intervenors challenged the Directives on a number of grounds. They claimed that the Attorney General lacked the authority to issue the Directives; that the Directives were arbitrary, capricious, unreasonable, and contrary to public policy; that retroactive disclosure of the names of officers violated equitable doctrines; that the Directives ran afoul of the Administrative

Procedure Act (APA); that they violated various constitutional rights, including substantive and procedural due process, equal protection, and the right to contract and to collective negotiations; and that the Directives violated ex post facto principles.

The Appellate Division stayed implementation of the Directives pending the outcome of the challenge; that stay remains in effect. The court also consolidated the appeals and granted motions to participate as amici curiae to the following groups: the New Jersey State Association of Chiefs of Police; the American Civil Liberties Union of New Jersey along with 23 other organizations (ACLU); the Association of Criminal Defense Lawyers of New Jersey and the New Jersey State Office of the Public Defender; and the National Coalition of Latino Officers and the Law Enforcement Action Partnership.

The Appellate Division upheld the Directives against the parties' facial challenge. In re Att'y Gen. Directives, 465 N.J. Super. at 128-29, 162. The court first concluded that the Attorney General had the authority to issue Directives 2020-5 and 2020-6. The court found the Directives did not conflict with section 10 of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-10; a regulation the Department adopted when OPRA was enacted, N.J.A.C. 13:1E-

13.2; and Executive Order 11, issued by Governor Brendan Byrne, all relating to the confidentiality of personnel records. Id. at 140-48.

The court also found the retroactive nature of the Directives did not run counter to ex post facto principles. Id. at 149. The Appellate Division noted the Directives were neither penal nor criminal in nature, and rested on longstanding statutory authority, not a change in the law. Ibid. Although not convinced that a retroactivity analysis was warranted, the Appellate Division concluded the Directives would survive such a challenge. Id. at 150. The court explained the officers "have no constitutionally protected vested right that the Directives could infringe," ibid., and the Directives did not constitute a manifest injustice, id. at 151-52.

The Appellate Division acknowledged the Directives represented a "sea change . . . in the Department's policy regarding the confidentiality of officer disciplinary records and" had engendered "deep feelings of unfairness . . . among law enforcement officers," who claimed they "were promised confidentiality when they settled internal disciplinary charges." Id. at 152-53. The court also referred to the Attorney General's concession that "some officers might have contract claims to the confidentiality of internal settlement agreements." Id. at 153.

In light of the limited record before it and the fact that appellants brought only a facial challenge to the Directives, the Appellate Division declined to address any contract claims or related arguments based on promissory and equitable estoppel. Id. at 153-54. The court left open the possibility of individual as-applied challenges and directed that officers be given fourteen days' notice -- rather than the seven-day period the Directives provided -- to pursue such claims. Id. at 154-55.

The Appellate Division rejected appellants' various constitutional arguments. The court found the Directives did "not rise to the level of a substantive due process violation implicating [appellants'] reputation or privacy rights" under federal law. Id. at 156. Nor did the claim that appellants' "substantive due process right to privacy under [the] State Constitution fare [any] better." Ibid. The court reasoned that

> appellants cannot show they have a constitutionally protected reasonable expectation of privacy in their disciplinary records that is not outweighed by the government's interest in public disclosure, in light of prior case law establishing their diminished expectation of privacy in those records, and the clear statement . . . since 2000 that the Attorney General could order the release of the records.
>
> [Ibid. (citing Doe v. Poritz, 142 N.J. 1, 88-91 (1995)).]

"[M]indful that [the] State Constitution extends due process protection to personal reputation," the appellate court found "no general right to a hearing

here." Ibid. The court added that "all affected officers have already received all the process they were due for their disciplinary charges, including representation by their union." Id. at 156-57.

The Appellate Division also found no merit in appellants' equal protection claims. The court observed that appellants "are not members of a suspect class and no fundamental constitutional right is impinged by publication of their disciplinary records." Id. at 157. The court therefore examined, and found, a rational basis for differentiating between law enforcement officers and other public employees: Disclosure of "the names of law enforcement officers who have received major discipline is obviously rationally related to the Attorney General's goal of increasing transparency of internal affairs and officer discipline in the State's law enforcement agencies, thereby making them more accountable to the communities they serve." Id. at 158.

In addition, the Appellate Division found the distinction between officers in the Department and those in local law enforcement was supported by rational bases. Id. at 159. Only the first group faced certain disclosure of major discipline dating back twenty years. Among other reasons proffered by the Attorney General, the court cited his explanation that the decision to release information about historical misconduct of local law enforcement

should be left to "the law enforcement executive closest to the community." Id. at 158.

The appellate court found the outcome would be the same under the State Constitution. Id. at 159. Balancing "the affected officers' right in the confidentiality of their disciplinary records [and] the extent to which the Directives impinge that right . . . against the public need for disclosure," the court concluded "the public need for more transparency in the internal affairs processes of the State's law enforcement agencies in this period of fraying public trust in law enforcement outweighs the officers' limited privacy right in their disciplinary records." Ibid.

The Appellate Division next rejected appellants' claim that the Directives violate the APA. Id. at 159-60. The court observed the Directives "fall within a statutory exception to the APA's definition of an administrative rule, because they constitute 'statements concerning the internal management or discipline of an agency.'" Id. at 160 (quoting N.J.S.A. 52:14B-2). As a result, the court found the Directives did not need to be promulgated through the APA's formal rulemaking process. Ibid.

The court also rejected appellants' claims that the Directives impair their right to contract and violate their constitutional right to collective negotiations. The court noted that no collectively negotiated agreements in the record

"address[] the confidentiality of . . . disciplinary records . . . other than to require compliance with the" Attorney General's Internal Affairs Policy & Procedures (IAPP). Ibid. Moreover, the court observed, the Attorney General issued the IAPP pursuant to statutory authority, N.J.S.A. 40A:14-181, "outside the collective negotiations process." Ibid. The Appellate Division accordingly concluded "a contract impairment analysis [was] unnecessary." Ibid.

The court added that any claims that "confidentiality assurances are mandatorily negotiable" must first be brought before the Public Employees Relations Commission. Id. at 160-61.

Finally, the Appellate Division concluded the Directives are not arbitrary, capricious, unreasonable, or against public policy. Id. at 161. The court credited the Attorney General's concern that public confidence in State and local law enforcement officers -- which is "essential for them to safely and effectively perform their jobs" -- "has become seriously frayed." Ibid. As the court explained, the Attorney General "determined he could best improve that trust by instilling greater accountability in the internal affairs processes that govern officer misconduct by ending the long practice of shielding the identities of officers receiving major discipline." Ibid. The Attorney General's Directives, the Appellate Division determined, "appear[] to us

neither arbitrary nor capricious and, instead, consistent with existing law and evolving public policy." Id. at 162.

The Appellate Division stayed the Directives for five days so that appellants could seek review before this Court. Ibid. At the same time appellants filed for emergent relief here, the Attorney General in essence consented to a further stay pending the outcome of the case. Soon after, we granted appellants' petitions for certification. 244 N.J. 447 (2020).

All of the amici who appeared before the Appellate Division continued to participate in this appeal. See R. 1:13-9(d). We also granted leave to the Reporters Committee for Freedom of the Press to appear as amicus curiae, and to three additional organizations that joined the ACLU.

II.

Appellants represent members of the State's 36,000 active law enforcement officers and some retired officers. See N.J. State Police, Uniform Crime Report, State of New Jersey 2016 174 (2016), https://www.njsp.org/ucr/2016/pdf/2016a_uniform_crime_report.pdf. They largely raise the same arguments they presented to the Appellate Division. Because their arguments overlap, we summarize them together where possible.

Appellants first argue that the Attorney General lacks authority to issue the Directives because they conflict with section 10 of OPRA (N.J.S.A. 47:1A-

10), regulations including N.J.A.C. 13:1E-3.2, and executive orders including Executive Order 11 (Byrne). Appellants contend those sources protect the confidentiality of public employees' personnel records and prohibit the disclosures the Directives require.

Next, appellants claim the Directives are arbitrary, capricious, unreasonable, and contrary to public policy. Among other arguments, they contend the Attorney General failed to demonstrate the Directives will build trust and promote transparency or that the benefits of the Directives outweigh the potential harm to officers.

Appellants also contend that many officers accepted discipline under negotiated settlement agreements in exchange for a promise of confidentiality. According to appellants, implementing the Directives would breach those promises, violate the doctrines of promissory and equitable estoppel, and fail to "turn square corners." As a result, appellants seek to permanently enjoin the Attorney General from enforcing the Directives.

Certain appellants raise a number of additional arguments. They claim the Directives violate the officers' rights to substantive and procedural due process and equal protection, impair their rights to contract and to negotiate collectively, violate the APA, and apply retroactively in an unfair manner.

Appellant NJSOA adds that the Appellate Division's instructions about individual as-applied challenges are vague and unworkable and fail to provide officers enough time to challenge the release of disciplinary information.

The New Jersey State Association of Chiefs of Police, as amicus, focuses on the retroactive nature of the Directives. The Association contends the Directives are arbitrary, capricious, and unreasonable to the extent they are applied retroactively. The Association also submits the Appellate Division's instructions for as-applied challenges are impractical.

The Attorney General counters that the Directives promote trust, transparency, and accountability; are not arbitrary or capricious; do not run afoul of OPRA or any regulations or executive orders; are consistent with estoppel doctrines, principles of retroactivity, and constitutional privacy principles; are not subject to formal rulemaking under the APA; and do not violate appellants' due process rights, the privacy of victims, the requirements of equal protection, or collective negotiations rights or contractual agreements. The Attorney General asks the Court to place careful limits on as-applied challenges and urges the Court to affirm the judgment of the Appellate Division.

A number of amici support the Directives. The ACLU and 26 other organizations argue that police accountability requires transparency of police

discipline. The organizations contend the Directives will provide the public with critical information and, in turn, promote trust in the police and public safety. The organizations note that many regulated professions in New Jersey have transparent disciplinary processes.

The National Coalition of Latino Officers and Law Enforcement Action Partnership argue that transparency greatly benefits police officers and promotes community trust. The groups also submit that transparency protects the rights of officers of color and will improve the overall disciplinary process for all officers.

The Association of Criminal Defense Lawyers of New Jersey and the Public Defender argue the Directives promote discovery of prior police misconduct in criminal cases, consistent with New Jersey's broad discovery rules and the State's constitutional obligation to produce exculpatory evidence.

The Reporters Committee for Freedom of the Press submits that the Directives will allow the news media to inform the public about officers' misconduct and responses by law enforcement agencies. The Committee also argues the Directives are compatible with OPRA.

III.

We first consider the Attorney General's authority to issue the Directives.

A.

As the State's chief law enforcement officer, the Attorney General has broad authority over criminal justice matters that derives from several sources. The Criminal Justice Act of 1970 declares it "the public policy of this State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State." N.J.S.A. 52:17B-98. The "[A]ct shall be liberally construed to achieve these ends." Ibid.

The Legislature also empowered the Attorney General to "[f]ormulate and adopt rules and regulations for the efficient conduct of the work and general administration of the [D]epartment, its officers and employees." N.J.S.A. 52:17B-4(d). Over the years, multiple Attorneys General have exercised that power to establish standards and policies for the internal affairs review process of the State's law enforcement agencies.

In 1991, Attorney General Del Tufo issued the first Internal Affairs Policy and Procedures manual. It established a comprehensive set of procedures to address "allegations of officer misconduct or the improper delivery of police services," for the purposes of "bolster[ing] the integrity of the police department." 1991 IAPP at 15. Five years later, the Legislature directed every law enforcement agency in the State, including local police

departments, to "adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP]." N.J.S.A. 40A:14-181. The guidelines must be consistent with tenure and civil services laws and "shall not supersede any existing contractual agreements." Ibid.

Each iteration of the IAPP has addressed the confidentiality of the disciplinary process. The 1991 IAPP expressly guaranteed that "[t]he progress of internal affairs investigations and all supporting materials are considered confidential information," and "[t]he contents of the internal investigation case files will be retained in the Internal Affairs Unit and clearly marked as confidential." 1991 IAPP at 15. Disciplinary hearings would "be closed to the public," unless the accused officer requested otherwise, and "[o]nly the police executive or his designee [was] empowered to release publicly the details of an internal investigation or disciplinary action." Ibid.

Revisions to the IAPP followed a similar approach: the progress of investigations and contents of case files were confidential but could be released in limited circumstances. The revised 2000 IAPP, for example, stated that "information and records of an internal investigation" could be released "[u]pon the request or at the direction of the county prosecutor or Attorney General." 2000 IAPP at 11-46. "The law enforcement executive officer" could allow "access [to] a particular file or record for good cause," and such

access was to be granted "sparingly." Id. at 11-46 to -47. That language remained in the 2011, 2014, 2017, and 2019 versions of the IAPP. 2011 IAPP at 47-48; 2014 IAPP at 42; 2017 IAPP at 42; 2019 IAPP at § 9.6.2.

The IAPP also required law enforcement agencies to prepare an annual report for the public that summarized types of complaints against officers and their outcomes but did not include officers' names. 2000 IAPP at 11-48; 2011 IAPP at 50; 2014 IAPP at 44; 2017 IAPP at 44; 2019 IAPP at § 9.11.1. The annual report could be "statistical in nature." 2011 IAPP at 50; 2014 IAPP at 44; 2017 IAPP at 44; 2019 IAPP at § 9.11.1. Starting with the 2019 IAPP, public reports had to be posted on websites of law enforcement agencies. 2019 IAPP at § 9.11.1.

In 2001, the Legislature likewise mandated the Superintendent of the State Police to submit an annual report of complaints of misconduct against members of the State Police, with the number of complaints and the results for each category. N.J.S.A. 53:1-10.1. The statistical report "shall not disclose personal identifiers" of any officers or complainants. Ibid.

Directives 2020-5 and 2020-6 altered those historical practices. As noted earlier, the Directives require that officers subject to major discipline be identified publicly.

The current IAPP still requires each law enforcement agency to publish on its public website, on an annual basis, a statistical report "summarizing the types of complaints received and the dispositions of those complaints." Directive 2020-5 at 3-4 (amending 2019 IAPP § 9.11.1). But for complaints in which an officer was terminated, received a reduction in rank or grade, or was suspended for more than five days, Directive 2020-5 requires that the identity of the officer be revealed, along with a brief summary of the offense and the sanction imposed. Id. at 4 (amending 2019 IAPP § 9.11.2).

The Directive distinguishes between "minor discipline" of up to five days' suspension and "major discipline." Id. at 3. "Major disciplinary violations can include conduct involving, among other things, excessive force against civilians, racially derogatory comments, driving while intoxicated, domestic violence, theft, the filing of false reports, and/or conduct that results in criminal charges against the officer." Ibid.

Directive 2020-5, issued on June 15, 2020, requires agencies to publish their first report no later than December 31, 2020, for discipline finalized during the preceding twelve months. Id. at 3-4. The Directive thus applies not only prospectively but also for at least five months before it was issued. In addition, Directive 2020-5 states that "nothing . . . prevents agencies from

releasing similar information regarding historical incidents of officer misconduct." Id. at 3.

The changes to the IAPP outlined above apply prospectively to officers in the New Jersey State Police, the Division of Criminal Justice, and the Juvenile Justice Commission, as well as local law enforcement officials. Directive 2020-6, issued on June 19, 2020, additionally requires the three state agencies to "publish the names of any officers who have been subject to serious discipline in the past twenty years." Directive 2020-6 at 1. The Attorney General directed the three agencies to publish, no later than July 15, 2020, the names of law enforcement officers subject to major discipline since January 1, 2000. Id. at 2. According to the Directive, each division must provide at least seven days' notice to each officer, "whenever possible," and "make reasonable efforts to contact" former "officer[s] at their last known residential address, email address, or phone number." Ibid.

Directive 2020-6 notes that it is a final agency action under Rule 2:2-3(a)(2). Id. at 3.

B.

Appellants claim the Directives violate OPRA, N.J.A.C. 13:1E-3.2, and Executive Order 11 (Byrne). According to appellants, those authorities protect

the confidentiality of personnel records in a way that bars the key changes to the IAPP. We do not agree.

OPRA is designed to give the public ready access to government records. The law seeks to promote transparency in government and avoid "the evils inherent in a secluded process." Brennan v. Bergen Cnty. Prosecutor's Off., 233 N.J. 330, 343 (2018) (quoting Mason v. City of Hoboken, 196 N.J. 51, 64 (2008)). OPRA's drafters understood "that without access to information contained in records maintained by public agencies citizens cannot monitor the operation of our government or hold public officials accountable for their actions." Fair Share Hous. Ctr., Inc. v. State League of Municipalities, 207 N.J. 489, 502 (2011).

Under the statute, government records are subject to disclosure unless the law exempts them from access. N.J.S.A. 47:1A-1. As the Appellate Division aptly noted, however, "this is not an OPRA case." In re Att'y Gen. Directives, 465 N.J. Super. at 139. Appellants are not asking for records to be disclosed; they seek the opposite.

Appellants highlight section 10 of the law, which limits the disclosure of personnel and pension records. See N.J.S.A. 47:1A-10 ("[T]he personnel or pension records of any individual in the possession of a public agency . . . shall not be considered a government record and shall not be made available for

public access . . . ."). Appellants contend the provision is an express statement of legislative policy in favor of confidentiality. Section 10, however, contains an important exception: "[P]ersonnel or pension records . . . shall be accessible when required to be disclosed by another law . . . ." Ibid. (emphasis added).

N.J.A.C. 13:1E-3.2(a), a regulation the Department adopted in 2014, similarly ties back to section 10. The regulation provides that certain records "shall not be considered government records subject to public access" under OPRA. N.J.A.C. 13:1E-3.2(a). Among other categories of exempt items, the regulation lists records about individual employees "relating to or which form the basis of discipline." Id. at (a)(4). But this regulation contains a critical exception as well. It does not apply to "records enumerated in N.J.S.A. 47:1A-10 as available for public access." Id. at (a)(4). In other words, a record subject to disclosure under section 10 of OPRA is likewise subject to disclosure under the regulation.

The same exception is embedded in Executive Order 11, issued by Governor Byrne. The order provides, in part, that "[e]xcept as otherwise provided by law . . . an instrumentality of government shall not disclose . . . personnel or pension records of an individual." Exec. Order No. 11 (November 15, 1974), 1 Laws of New Jersey 1974 765 (emphasis added).

As noted earlier, the Legislature expressly gave the Attorney General responsibility over "the general supervision of criminal justice . . . as chief law enforcement officer of the State," N.J.S.A. 52:17B-98, and directed the Attorney General to "[f]ormulate and adopt rules and regulations" to administer the Department, N.J.S.A. 52:17B-4(d). Based on that authority, Attorneys General have issued various directives that govern the disciplinary process.

As the Court has recognized on prior occasions, Attorney General directives relating to the administration of law enforcement have the "force of law." See N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 565 (2017) (concluding that the Attorney General's Use of Force Policy has "the force of law for police entities" (quoting O'Shea v. Township of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009))); Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 20-21 (2018) (finding that a local police chief's general order does not carry the force of law, unlike guidelines, directives, and policies issued by the Attorney General). The IAPP, in particular, carries the force of law for State and local law enforcement. Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 100-01 (2020).

Appellants contend that although the Attorney General has the power to issue directives, they are not "laws" passed by the Legislature, and therefore

do not trigger the exceptions in the above three sources. But even if we accept that argument, the Legislature enacted a separate statute that underscores the force of the IAPP. N.J.S.A. 40A:14-181 embraces the Attorney General's policy on internal affairs matters by directing law enforcement agencies throughout the state to adopt guidelines consistent with the IAPP. See Fraternal Ord. of Police, 244 N.J. at 101 ("Section 181 effectively made the AG's IAPP required policy for all municipal law enforcement agencies in New Jersey."). And the policy in effect at the time section 181 was enacted declared that police executives, like the Attorney General, could release disciplinary records. See 1992 IAPP ("Only the police executive or his designee is empowered to release publicly the dispositions of an internal investigation or disciplinary action.").

The Directives therefore do not conflict with OPRA, N.J.A.C. 13:1E-3.2(a), or Executive Order 11. They are binding policy measures that provide a basis in law for the release of the names of officers who have been subjected to major discipline.[1]

[1] N.J.S.A. 53:1-10.1, which appellants reference, has no bearing on the Attorney General's authority to issue the Directives. The statute is discussed in section III.A above.

IV.

Appellants also argue that the Directives are arbitrary, capricious, and unreasonable and, therefore, cannot be upheld. The Attorney General acknowledges the Directives are final agency action and contends that appellants have not overcome the substantial deference owed the Department.

A.

Judicial review of actions by administrative agencies is provided for under the State Constitution. N.J. Const. art. VI, § 5, ¶ 4; see In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013); see also R. 2:2-3(a)(2) (providing for review of final agency decisions or actions in the Appellate Division).

Courts apply a deferential standard to final agency actions and will not overturn them unless an action is arbitrary, capricious, or unreasonable. In re Yucht, 233 N.J. at 279. The burden to make that showing "rests upon the [party] challenging the administrative action." Lavezzi v. State, 219 N.J. 163, 171 (2014) (alteration in original) (quoting In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013)).

The deferential standard is consistent with "the strong presumption of reasonableness that an appellate court must accord an administrative agency's exercise of statutorily delegated responsibility." City of Newark v. Nat. Res.

Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980); accord Lavezzi, 219 N.J. at 171. The standard also recognizes the "agency's expertise and superior knowledge of a particular field," In re Carter, 191 N.J. 474, 483 (2007) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)), as well as the Judiciary's "limited role . . . in reviewing the actions of other branches of government," In re Musick, 143 N.J. 206, 216 (1996).

In applying the standard, courts do not consider what they might have done in the agency's place or substitute their judgment for the agency's. See Greenwood, 127 N.J. at 513. Courts instead typically consider three things:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [In re Quest Acad., 216 N.J. at 385 (quoting Mazza v. Bd. of Trs., PFRS, 143 N.J. 22, 25 (1995)).]

Although the three-part inquiry applies generally to all administrative agency actions, see id. at 386, it is not a rigid standard. Its application necessarily adjusts to accommodate the kind of agency action in question. See generally Pressler & Verniero, Current N.J. Court Rules, cmts. 7.1 & 8.1 on R. 2:10-2 (2021).

Most administrative agencies perform two delegated functions: they have the power to make rules that can have the effect of laws -- a quasi-legislative role -- and the power to adjudicate individual cases -- a quasi-judicial role. See Jacob A. Stein et al., 4 Administrative Law § 14.01 (2021); accord Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 135 (2001); see also In re Quest Acad., 216 N.J. at 386 (citing examples); Jeffrey S. Mandel, N.J. Appellate Practice, 38:1-2 (2021) (distinguishing types of administrative action). "The line between the[] two functions," however, "is not always a clear one." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 770 (1969) (Black, J., concurring); accord Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 332 (1984); Carls v. Civ. Serv. Comm'n of N.J., 17 N.J. 215, 220 (1955). Agencies can also act in a hybrid manner, with features of rulemaking and adjudication, or in an informal fashion, without a hearing. Nw. Covenant Med. Ctr., 167 N.J. at 136-37.

The nature of an administrative action affects how the standard of appellate review is applied. See Pressler & Verniero, cmts. 7.1 & 8.1 on R. 2:10-2 (collecting cases). For example, the three-part test is a good fit for review of quasi-judicial actions. In those matters, a robust record naturally invites focused attention on the test's second prong -- "whether the record contains substantial evidence to support the findings on which the agency

based its action." In re Quest Acad., 216 N.J. at 385 (quoting Mazza, 143 N.J. at 25). But for more policy-driven, quasi-legislative acts, the record may be less extensive. An agency's action must still rest on a reasonable factual basis, but its choice between two supportable, yet distinct, courses of action "will not be deemed arbitrary or capricious as long as it was reached 'honestly and upon due consideration.'" In re Adoption of Amends. & New Regs. at N.J.A.C. 7:27-27.1, 392 N.J. Super. 117, 135-36 (App. Div. 2007) (quoting Worthington v. Fauver, 88 N.J. 183, 204-05 (1982)).

The Directives do not fit easily into the typical categories of agency action. They are not the result of adjudication, so there is no record of a hearing before the Office of Administrative Law. See N.J.S.A. 52:14B-10; N.J.A.C. 1:1-18.6(b), (c). Nor were they adopted under the rulemaking requirements of the APA, N.J.S.A. 52:14B-1 to -15, which allows agencies to give reasons for an action or policy during a notice and comment period, see N.J.S.A. 52:14B-4.

The Directives most closely resemble quasi-legislative action. They apply in a uniform fashion without the need for individualized determinations. When an executive branch official acts in a quasi-legislative manner, the arbitrary and capricious "standard does demand that the reasons for the decision be discernible, [but they] need not be as detailed or formalized as an

agency adjudication of disputed facts." In re Englewood on Palisades Charter Sch., 320 N.J. Super. 174, 217 (App. Div. 1999), aff'd as modified, 164 N.J. 316 (2000); accord In re Red Bank Charter Sch., 367 N.J. Super. 462, 476 (App. Div. 2004); Bd. of Educ. of E. Windsor Reg'l Sch. Dist. v. State Bd. of Educ., 172 N.J. Super. 547, 552 (App. Div. 1980).

More generally, the appellate standard in such matters focuses on whether the agency's decision is consistent with its delegated authority. Judicial intervention is limited to "those rare circumstances in which it is clear that the agency action is inconsistent with its mandate." In re Petition for Rulemaking, 117 N.J. 311, 325 (1989).

The Legislature empowered the Attorney General to issue directives. To determine whether a particular directive is arbitrary, capricious, or unreasonable, courts consider whether "there is any fair argument in support of the course taken or any reasonable ground for difference of opinion among intelligent and conscientious officials." Flanagan v. Dep't of Civ. Serv., 29 N.J. 1, 12 (1959). "Put another way, is the rule unreasonable or irrational?" Bergen Pines Hosp. v. Dep't of Human Servs., 96 N.J. 456, 477 (1984). To answer that question, we turn to the Directives themselves.

B.

The Directives detail the Attorney General's justification for releasing the names of officers subject to major discipline. Because the rationale underlying the Directives is critical to this appeal, we quote from them at length.

Directive 2020-5 is addressed to all law enforcement chiefs. At the outset, it acknowledges "good reasons why internal affairs records are not generally disclosed," namely, "the need to protect those who report and witness police misconduct," and the fact that a number of complaints "are ultimately determined to be unsubstantiated or unfounded." Directive 2020-5 at 1.

The Attorney General, however, also emphasizes that

> [l]aw enforcement officers are entrusted with extraordinary responsibility and it is imperative that all officers maintain the highest standards of good discipline and conduct. Therefore, when a law enforcement agency concludes that one of its members has violated agency rules in a way that warrants professional sanction, there is a stronger rationale for public disclosure. And the more significant the violation, the more important it is that the public know about the misconduct.
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> [Id. at 1-2.]

After briefly reviewing recent changes to the IAPP, Directive 2020-5 continues:

> More is required to promote trust, transparency and accountability, and I have concluded that it is in the public's interest to reveal the identities of New Jersey law enforcement officers sanctioned for serious disciplinary violations. Our state's law enforcement agencies cannot carry out their important public safety responsibilities without the confidence of the people they serve. The public's trust depends on maintaining confidence that police officers serve their communities with dignity and respect. In the uncommon instance when officers fall well short of those expectations, the public has a right to know that an infraction occurred, and that the underlying issue was corrected before that officer potentially returned to duty.
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> [Id. at 2.]

Directive 2020-5 next observes that "[t]he vast majority of law enforcement officers . . . serve with honor and . . . courage . . .[, b]ut their good work is easily undermined . . . whenever an officer breaches the public's trust." Ibid. Underscoring the importance of deterrence, the Directive adds the following:

> The likelihood of such misbehavior increases when officers believe they can act with impunity; it decreases when officers know that their misconduct will be subject to public scrutiny and not protected. The deterrent effect of this scrutiny will, in the end, improve the culture of accountability among New Jersey law enforcement.

[Ibid.]

As noted before, Directive 2020-6 is addressed to three entities in the Department -- the State Police, Division of Criminal Justice, and Juvenile Justice Commission. The Directive adopts the above reasons and explains that "[s]haring the identities of individuals who received major discipline will allow for public scrutiny and improve the culture of accountability among the Department's law enforcement agencies." Directive 2020-6 at 1.

Directive 2020-6 also addresses the reason the new policy extends to former employees:

> [M]any of our officers go on to serve with other law enforcement agencies, and the State at present lacks a licensing system to track such repeat disciplinary sanctions across agencies. Moreover, the sharing of identities will enable the public and policymakers to identify repeat offenders, and to hold the Department's law enforcement agencies accountable for their response to patterns of discipline. And, most importantly, the sharing of identities will help to build public confidence in the vast majority of officers . . . [and] will help to build significant trust between [the] officers and the communities they serve.
>
> [Id. at 2.]

The Attorney General highlighted a number of the same concerns at oral argument. Among others, he emphasized that releasing the names of officers

subject to major discipline will enable the public to monitor the internal affairs process and gauge, for example, if progressive discipline worked effectively or if officers were promoted after repeated episodes of serious misconduct. In addition, the Attorney General stressed why it is important to reveal prior instances of serious misconduct by former or retired officers. If they seek employment with other law enforcement agencies, their internal affairs files are available for review under the IAPP. See 2020 IAPP §§ 3.1.1, 3.1.2. That is not the case, though, for officers looking to move to a sensitive, quasi-law-enforcement position, like a security post in a public school or hospital, or a similar position in the private sector. The public likewise would not have access to the information.

To be sure, the parties strongly disagree about the wisdom and consequences of the Directives, and appellants offer a very different perspective. They contend the Directives will embarrass officers and make them and their families targets for retribution; undermine the integrity of the investigatory process; chill cooperation from officers; discourage officers from seeking treatment for alcohol or drug dependencies; undermine the command structure in law enforcement agencies; have a negative effect on public safety; and reveal the identities of victims and witnesses in domestic violence and other matters. Appellants also believe the Attorney General's rationale is

flawed in that the new Directives will not achieve accountability and will add nothing to a process that is already adequate. In addition, they contend the Attorney General's focus on what penalties are assessed, rather than on the type of misconduct committed, renders the Directives over-inclusive and arbitrary.[2, 3]

Disagreement over a policy, however, does not make it arbitrary, capricious, or unreasonable. If an administrative action is consistent with legislative policies, rests on a reasonable basis, reflects careful consideration

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[2] "An employee may be subject to [major] discipline for: (1) Incompetency, inefficiency or failure to perform duties; (2) Insubordination; (3) Inability to perform duties; (4) Chronic or excessive absenteeism or lateness; (5) Conviction of a crime; (6) Conduct unbecoming a public employee; (7) Neglect of duty; (8) Misuse of public property, including motor vehicles; (9) Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment; (10) Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder; (11) Violation of New Jersey residency requirements . . . ; and (12) Other sufficient cause." N.J.A.C. 4A:2-2.3; see also N.J.A.C. 4A:2-3.1(c). Under the Administrative Code, "major discipline" includes "[r]emoval, [d]isciplinary demotion, and [s]uspension or fine for more than five working days at any one time." N.J.A.C. 4A:2-2.2(a).

The Attorney General notes that disclosure of incidents resulting in major discipline tracks lines drawn by the Civil Service Commission and avoids "subjective or vague determinations" about "the kind of misconduct that the public deserves to know about."

[3] Amicus Chiefs of Police also submits that the retroactive nature of the Directives makes them arbitrary and fundamentally unfair. We consider the issue of retroactivity separately below.

of the issues, and can otherwise satisfy the standard for appellate scrutiny, the policy should be upheld. See In re Adoption of Amends., 392 N.J. Super. at 135-36. Here, the Attorney General exercised authority the Legislature placed in his office to develop and revise disciplinary policies. He acted to enhance public trust and confidence in law enforcement, to deter misconduct, to improve transparency and accountability in the internal affairs process, and to prevent officers from evading the consequences of their misconduct. The Attorney General's reasoned bases for acting were fully consistent with the Department's mandate. See In re Petition for Rulemaking, 117 N.J. at 325.

The Directives implement a practice that is common in other professions. When doctors, lawyers, judges, and other professionals are disciplined for misconduct, their names are made public. See, e.g., N.J.S.A. 45:9-22.22(a), -22.23(7) to (8) (physicians, podiatrists, and optometrists); R. 1:20-9(m) (attorneys); R. 2:15-15(a), -20(b) (judges). The New Jersey Division of Consumer Affairs lists the results of disciplinary actions against accountants, architects, dentists, electrical contractors, engineers, nurses, pharmacists, plumbers, real estate appraisers, and others on its website. See Division of Consumer Affairs, https://www.njconsumeraffairs.gov/ (last visited June 1, 2021) (select "Boards and Committees," then choose the applicable profession and select "Actions (Disciplinary and Other)").

Once again, thoughtful concerns in opposition to a new policy are not fatal to administrative action. The Attorney General's decision to release the names of law enforcement officers subject to major discipline is consistent with his delegated authority and grounded in reason. It is not arbitrary, capricious, or unreasonable.

V.

To the extent appellants continue to advance an ex post facto claim, we agree with the Appellate Division that the release of officers' names from matters resolved before the Directives were issued does not violate the Ex Post Facto Clause. In re Att'y Gen. Directives, 465 N.J. Super. at 149-52.

"The Ex Post Facto Clause is 'aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts."'" State v. Perez, 220 N.J. 423, 438 (2015) (quoting Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 504 (1995)); see State v. Hester, 233 N.J. 381, 392 (2018). The Directives do none of those things. Nor do they reflect a change in the law. See State v. Purnell, 161 N.J. 44, 53 (1999) (noting that for retroactivity purposes, "the threshold inquiry [is] whether the rule at issue is a 'new rule of law'" (alteration in original) (quoting State v. Afanador, 151 N.J. 41, 57 (1997))). In addition, a departmental rule or regulation that is civil and non-

punitive is not subject to the Ex Post Facto Clause. See Riley v. State Parole Bd., 219 N.J. 270, 292-93 (2014).

The Attorney General's authority is grounded in statutes enacted decades ago. See N.J.S.A. 52:17B-4 (enacted in 1948); N.J.S.A. 52:17B-98 (enacted in 1970). And as discussed above in section III.A, the Attorney General has advised officers for more than twenty years that their internal affairs records might be released.

Insofar as appellants challenge the manner in which the Attorney General exercised his discretionary authority to change longstanding practice, their claim emphasizes estoppel principles, to which we turn next.

VI.

Appellants argue that the Directives violate the doctrine of promissory estoppel. There are four elements to a claim under the doctrine: "(1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Goldfarb v. Solimine, 245 N.J. 326, 339-40 (2021) (quoting Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008)).

Promissory estoppel is an equitable doctrine that has its roots in contract law but is distinct from a typical claim to enforce a contract. Goldfarb, 245 N.J. at

340-41, 341 n.6. In that regard, we note that N.J.S.A. 40A:14-181 expressly provides that IAPPs "shall not supersede any existing contractual agreements."

Appellants also rely on the related theory of equitable estoppel, which requires a showing of "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." In re Johnson, 215 N.J. 366, 379 (2013) (quoting O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987)); see also Williston on Contracts § 8:3 (Lord ed. 2008).

Principles of estoppel must be evaluated with care when a party seeks to apply them against the government. See In re Johnson, 215 N.J. at 378 ("Equitable estoppel is rarely invoked against a governmental entity, particularly when estoppel would 'interfere with essential governmental functions.'" (citations omitted) (quoting O'Malley, 109 N.J. at 316)); Harmon v. Del. Harness Racing Comm'n, 62 A.3d 1198, 1200-01 (Del. 2013) (noting that "as a general rule," in the context of promissory estoppel claims, "the 'state is not estopped in the exercise of its governmental functions by the acts of its officers'" (quoting McCoy v. State, 277 A.2d 675, 676 (Del. 1971))).

A.

Appellants submitted multiple certifications in support of their claim in order to demonstrate that the Office of the Attorney General made clear promises of confidentiality throughout the disciplinary process. The Appellate Division observed that appellants pursued only a facial challenge to the Directives. In re Att'y Gen. Directives, 465 N.J. Super. at 153-54. The court also properly found it could not resolve estoppel claims on the existing record. Id. at 153. Instead, the Appellate Division noted that individual officers could pursue as-applied challenges within fourteen days of getting notice. Id. at 154-55. The Attorney General asks the Court to provide guidance for those potential challenges.

Although the record is incomplete, it raises significant concerns in that it suggests that officers who agreed to major discipline received assurances of confidentiality. The Attorney General points out that since 2000, the IAPPs have stated the Attorney General and County Prosecutor could release the names of officers who had been disciplined, and that law enforcement executives could authorize access to internal affairs files "for good cause." See 2000 IAPP at 11-46; 2011 IAPP at 47; 2014 IAPP at 42; 2017 IAPP at 42; 2019 IAPP at § 9.6.2. The historical practice, however, is not so clear.

Each IAPP stresses that records of internal affairs investigations are confidential and that files must be "clearly marked as confidential." 1991 IAPP at 15; 1992 IAPP; 2000 IAPP at 11-46; 2011 IAPP at 47; 2014 IAPP at 42; 2017 IAPP at 42; 2019 IAPP at § 9.6.1. In addition, a series of certifications in the record from the Superintendent of the State Police and others assert that for many years, the internal affairs process has been replete with promises of confidentiality and reassurances from state officials to officers who agreed to discipline.

Former Superintendent Joseph R. Fuentes submitted a certification in which he explained that he was personally involved in disciplinary matters during his tenure and had the ultimate responsibility to approve final settlements and set penalties for State Troopers in disciplinary matters. Fuentes Certif., Aug. 4, 2020, ¶ 26. He also had statutory responsibilities relating to the disciplinary process. Pursuant to N.J.S.A. 53:1-10, "[t]he superintendent shall, with the approval of the governor, make all rules and regulations for the discipline and control of the state police."

Among other statements, the Superintendent certified to the following:

> * "State Troopers were ordinarily extended a promise that such disciplinary matters would remain confidential and that their names and identities would not be released to the public." Fuentes Certif., ¶ 27 (emphases added).

* "The office of the State Attorney General is not just an observer of this process; rather [it is] an integral part in constructing, reviewing and approving confidentiality agreements in matters of General Discipline (subject to 30 or more days of suspension) . . . ." Ibid.

* "I personally provided the assurance of confidentiality to many State Troopers under my command . . . ." Id. ¶ 28 (emphasis added).

* "During my tenure with the State Police internal affair[s] files were always maintained as confidential and privileged documents." Id. ¶ 32.

* "State Troopers who were involved in an internal affairs investigation were advised that the process was confidential." Id. ¶ 58.

* "State Troopers who resolved disciplinary matters were advised that any settlements of disciplinary matters or plea agreements would remain confidential and that their identities would not be disclosed." Id. ¶ 60 (emphasis added).

* "In exchange for accepting a settlement a Trooper was promised confidentiality and a promise was also extended that it would not stand as a shaming incident for the remainder of his career." Id. ¶ 69 (emphasis added).

Trooper Wayne D. Blanchard, President of the State Troopers Fraternal Association of New Jersey, certified as follows:

> * "During the disciplinary process, . . . [t]he Trooper and the NJSP can enter a Voluntary Negotiated Plea Agreement and the Trooper is advised that it will remain strictly confidential and recorded in the member's Discipline File and would not be released to the public." Blanchard Certif., Aug. 5, 2020, ¶ 9.
>
> * "It is explained very clearly that if the matter is not adjudicated within the NJSP, the matter would be transmitted to the Office of Administrative Law for a hearing, if applicable, and from that point forward the matter is made public." Ibid.
>
> * "The guarantee of confidentiality has caused many Troopers to enter into settlement agreements with the NJSP." Id. ¶ 10 (emphasis added).

Detective Sergeant Pete J. Stilianessis, president of the State Troopers Non-Commissioned Officers Association, also submitted a certification. He stated in broad terms as follows:

> * "Every disciplinary action assessed against State Troopers was premised upon express representations of confidentiality and privilege." Stilianessis Certif., ¶ 36.
>
> * "This express representation was formally extended to union representatives, individual troopers and their attorneys." Id. ¶ 37.
>
> * "Confidentiality was assured and promised at every stage of the disciplinary process." Id. ¶ 38.
>
> * "Command staff within the Division of State Police directly informed Troopers union representatives and

> attorneys engaged within the disciplinary process, that the entire matter would be deemed privileged and confidential and would never be released to the public." Id. ¶ 39.

Stilianessis also quoted an anonymous trooper who certified that "[d]uring the entrance of the negotiated settlement agreement, I was assured that this matter was confidential and that it would not define my career." Id. ¶ 69. Another anonymous trooper made a similar statement. Id. ¶ 70.

In addition, Stilianessis noted that, as recently as 2019, the Attorney General argued before the Appellate Division against the release of the name of any State Trooper linked to a disciplinary charge. See id. ¶ 42. In a brief to the Appellate Division in Libertarians for Transparent Government v. New Jersey State Police, a case that involved an OPRA request, the Attorney General argued that law enforcement officers are "entitled to . . . [a] reasonable expectation of privacy" in their disciplinary history. Att'y Gen. Br., Aug. 6, 2018, at 2; cf. 243 N.J. 515 (2020) (dismissing the appeal upon stipulation of the parties). The Attorney General also argued that "[t]he confidentiality interest supporting non-disclosure of information relating to internal and criminal investigations of State Police members is significant." Id. at 7-8.

The Attorney General's brief in Libertarians appears to validate part of the certifications before the Court in this case. In particular, the office's written submission concedes

> [i]t is often the case that the subject of an internal affairs investigation agrees to accept culpability of some, or all of the charges brought against him or her and waives his or her right to formal administrative proceedings on the charges. By choosing to resolve the matter, and not bring the matter to a public forum, [the Trooper's] identity is protected from public disclosure. Not only does this fact undoubtedly incentivize some troopers to agree to cooperate, but it also benefits the investigating unit by not having to expend as many resources to conclude an investigation yet still bring a favorable outcome.
>
> [Id. at 9-10 (emphasis added).]

The trial court in Libertarians accepted the State's argument and declined to order disclosure of the Trooper's identity. After oral argument in 2019, the Appellate Division affirmed for substantially the same reasons.[4]

The Attorney General oversees the Department of Law and Public Safety, of which the State Police is a part. He has the ultimate authority to set policy for the Department and can decide to change direction on matters of policy. Although stated positions of the Attorney General may not necessarily

[4] We refer to the proceedings because they offer relevant context; we do not suggest the rulings are precedential. See R. 1:36-3.

amount to clear and definite promises, see Goldfarb, 245 N.J. at 340, it is understandable for appellants to highlight prior public comments that support their position as they advance equitable claims.

In a related argument, appellants remind the Court that government agencies must "turn square corners" in their dealings with others. See W.V. Pangborne & Co., Inc. v. Dep't of Transp., 116 N.J. 543, 561-62 (1989). We do not find the Directives violated that standard. They reflect the considered judgment of the Attorney General about public accountability of law enforcement officers. At the same time, we recognize that an agency's recent formal statements can have a bearing on the equitable arguments appellants raise.

Among other reasons, the Attorney General contends that appellants' estoppel argument should fail because disciplinary records are disclosed in criminal cases to satisfy the requirements of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Giglio, 405 U.S. 150 (1972), and to respond to civil discovery requests. But no promise of confidentiality could attach to those affirmative legal obligations. In addition, those disclosures arise in a rather different context. Discovery materials disclosed in those settings are not made to the public and can be subject to a protective order or some other form of oversight by the court. In contrast, the Directives require or invite the

posting of twenty years of major disciplinary findings, with officers' names attached, on a public website.

B.

We cannot probe the certifications in the record or resolve appellants' equitable claims.[5] We also recognize that information contained in the certifications might be relevant to hundreds of potential individual challenges. See Fuentes Certif., ¶ 16 (estimating there are nearly 500 cases involving major discipline with the State Police that date back twenty years). To help ensure that relevant issues are resolved in a uniform and efficient manner, we exercise our supervisory authority to establish the following process. See N.J. Const. art. VI, § 2, ¶ 3.

A single Judge of the Superior Court will be designated to conduct a broad-ranging evidentiary hearing. The hearing should explore the practice of the State Police relating to disciplinary matters, and the question of confidentiality, in particular, before the Directives were issued. All parties and amici shall receive notice of the hearing and have the opportunity to

[5] To be clear, estoppel claims can be raised only by officers who settled their disciplinary actions. Officers who contested accusations against them in the course of a public hearing cannot claim they relied on a promise of confidentiality. At oral argument, appellants estimated that ninety percent of disciplinary cases are resolved through settlement agreements.

participate. Both sides may present witnesses and documentary evidence; they may also probe the role of counsel from the Department of Law and Public Safety.

The judge shall make appropriate findings. If there is sufficient credible evidence, the court, in its discretion, may resolve the issue of confidentiality on a broad scale. In other words, if the court finds that promises of confidentiality were made and relied on consistent with the appropriate legal standards, see Goldfarb, 245 N.J. at 339-40; In re Johnson, 215 N.J. at 378, it could bar the release of names of law enforcement officers subject to Directive 2020-6 for disciplinary matters settled before June 19, 2020. If the record does not support such a conclusion for the entire group of officers, the court's more limited findings may be incorporated and made part of the record in individual challenges that will likely follow.[6]

Depending on the outcome of the above hearing, State Troopers and law enforcement officers in the Division of Criminal Justice and the Juvenile Justice Commission ("Troopers") are to file any as-applied challenges afterward in the Superior Court in the nature of actions in lieu of prerogative writs. See R. 4:69. The Attorney General shall first provide current and

[6] We do not retain jurisdiction. The outcome of the hearing is subject to the ordinary rules of appellate procedure.

retired Troopers notice of the proposed disclosure by personal service, in the manner required by Rules 4:4-3(a), -4(a)(1), and -4(b)(1).[7] Current or retired Troopers, in turn, are to file any actions within 45 days of receiving such notice. R. 4:69-6(a). The additional time beyond 14 days, see In re Att'y Gen. Directives, 465 N.J. Super. at 154-55, will enable Troopers to contact and retain counsel, and interact with the Department before deciding whether to proceed to court. Troopers' names shall not be released during the 45-day period.

As part of the notice, the Attorney General shall identify a point of contact in the Department from whom Troopers may seek additional information. See id. at 155. The Attorney General has agreed to do so. At oral argument, the Attorney General also represented that the office would disclose relevant disciplinary files to Troopers on request. It is incumbent on Troopers to ask for their files in a timely manner; the files should be disclosed within two weeks of a request.

In addition, the Attorney General represents that "no synopsis of discipline will include the name of any victim, nor will it identify them by

[7] The Attorney General represents that his office has already given notice to individuals affected by Directive 2020-6. It is unclear what type of notice was provided.

relationship to the offender (e.g., ex-spouse or child)." Like the Appellate Division, we urge the Attorney General to take further steps to protect the identity of victims of domestic violence, including extra redactions and advance notice to victims in appropriate cases. See id. at 155 n.6. We also accept the Attorney General's representation that no synopsis will be published for Troopers known to be deceased.

The trial court shall employ specialized case management to expedite the proceedings. See R. 4:69-4. Until a challenge is resolved by the trial court, and subject to any stays entered pending appeal, the challenger's identity shall not be released. To that end, cases may be filed with fictitious names in the caption, and courts may enter appropriate protective orders. As to the merits, the challengers have the burden to prove why they should prevail.

We do not separately address potential challenges that may arise if or when local chief law enforcement executives decide to release names of officers involved in historical incidents of misconduct, pursuant to Directive 2020-5. The record contains memos from three County Prosecutors in Bergen, Essex, and Union Counties, and a certification relating to the City of Paterson. They set forth different approaches to publish the names of officers subject to major discipline for certain types of misconduct dating back to 2000 or 2014. The record is not as developed about promises of confidentiality relating to

settlements reached before June 2020. Nor does it address other prosecutors or municipalities.

If parties seek to challenge orders by chief law enforcement executives, pursuant to Directive 2020-5, on estoppel grounds, they may file an application with the Assignment Judge in their respective vicinages. Assignment Judges have the authority to set up a process similar to the one outlined above for State Troopers -- a broad-based evidentiary hearing about an agency's disciplinary practices, followed by individual as-applied challenges, if necessary. The procedures outlined above for as-applied challenges brought by Troopers would apply as well.

C.

The Directives also apply prospectively. For major discipline imposed after the Attorney General issued the Directives, officers can expect that their identities will be released to the public. They may challenge disciplinary findings in the ordinary course. That process can vary based on the agency involved and the jurisdiction in which it operates. Compare N.J.A.C. 4A:2-2.1 to -2.13 (Civil Service jurisdictions), with N.J.S.A. 40A:14-147 to -151 (non-Civil Service jurisdictions).

The framework outlined in section VI.B applies only to historical cases of major discipline, imposed before the Directives were issued, in which officers challenge the release of their names on estoppel grounds.

VII.

Defendants raise a number of additional arguments. They claim the Directives violate their rights to substantive and procedural due process and equal protection; run afoul of the APA; impair their constitutional right to contract; and violate their constitutional right to collective negotiations. As to those points, we affirm the judgment of the Appellate Division largely for the reasons stated in Judge Accurso's thoughtful opinion. See In re Att'y Gen. Directives, 465 N.J. Super. at 155-61.

VIII.

For the reasons outlined above, we modify and affirm the judgment of the Appellate Division. In a separate order, we also designate a single Judge of the Superior Court to conduct the broad-based hearing described in section VI.B.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

LIBERTARIANS FOR TRANSPARENT GOVERNMENT, a NJ Nonprofit Corporation, Plaintiff-Appellant, v. CUMBERLAND COUNTY and BLAKE HETHERINGTON, in her official capacity as Custodian of Records for Cumberland County, Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 084956 Civil Action ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A-1661-18T2 Sat Below: Hon. Clarkson S. Fisher, P.J.A.D. Hon. Allison E. Accurso, J.A.D. Hon. Robert J. Gilson, J.A.D.

PLAINTIFF'S SUPPLEMENTAL BRIEF & APPENDIX

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07601
Ph: (201) 488-8200
F: (201) 488-5556
cgriffin@pashmanstein.com

Attorneys for
Plaintiff-Appellant,
Libertarians for Transparent Government, A NJ Nonprofit Corporation

On the Brief:
CJ Griffin, Esq. (031422009)

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PRELIMINARY STATEMENT

Most personnel records are confidential under the Open Public Records Act (OPRA). The personnel records exemption, however, contains three exceptions that make information about public employees and their terms of employment accessible to the public. Two of those exceptions are at issue in this case, which involves a separation agreement between Cumberland County and a corrections officer who admitted to sexually abusing women inmates but was permitted to retire in good standing with his pension.

The second exception to the personnel records exemption states that personnel records "shall be accessible when required to be disclosed by another law." N.J.S.A. 47:1A-5(e) mandates that a requestor be granted "immediate access" to "individual employment contracts." Thus, the separation agreement should have been provided to Plaintiff immediately. The Appellate Division's decision did not cite this statute.

The first exception to the personnel records exemption states that an employee's "name, title . . date of separation and the reason therefor . . . shall be a government record." The Appellate Division held that this provision does not require personnel records to be produced in redacted form so that this information is disclosed. Rather, it held that an agency can satisfy its obligations by merely *telling* a requestor this information, a holding that is problematic given that in this very case, the court also acknowledged that Cumberland County "mischaracterized" Ellis'

reason for separation when it responded to Plaintiff's request. The holding is also at odds with decades of published case law.

In South Jersey Publishing Co. v. N.J. Expressway Authority, 124 N.J. 478 (1991), this Court held that an agency was required to disclose its closed session meeting minutes that contained the results of an investigation into an employee's alleged misuse of agency credit cards, as well as a copy of an agreement that permitted the employee to resign in good standing with his pension and several months of salary and benefits. Although the Court recognized that most personnel records were exempt from access under the Right to Know Law (RTKL) because Governor Byrne's Executive Order No. 11 (EO11) rendered them confidential, the Court found the disclosures were nonetheless required because EO11 contained an exception requiring disclosure of an employee's "date of separation" and the "reason therefor."

The Legislature imported EO11 almost verbatim into OPRA's personnel records exemption and an employee's "date of separation and the reason therefor" continued to be publicly accessible information. Pursuant to cannons of statutory interpretation, this means the Legislature *also* imported this Court's prior interpretation of that language in South Jersey Publishing.

Without citing to South Jersey Publishing, this Court applied a similar analysis in Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581 (2011). There, the Court analyzed the third exception to the personnel records exemption, which states that

"data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment . . . shall be a government record." Although the Court did not expressly use the word "redact," the decision is clear that a personnel record must be produced "to the extent that it discloses" information within the exception. This comports with N.J.S.A. 47:1A-5(g)'s general instruction that public agencies must redact exempt information from government records and release the non-exempt portions.

There is no reason to depart from this prior precedent. Doing so would make New Jersey far more secretive at a time when the public is clamoring for information about corrections officers and police officers who engage in misconduct. Instead of fostering transparency, the Appellate Division's decision allows bad actors to continue to resign in good standing and move on to another position in another agency, often times with a large payout. The public has a right to know the reasons why an employee left employment and the terms of that departure as set forth in these separation agreements. Releasing the agreements not only exposes the bad behavior of the employee, but also allows the public to determine whether the public agency was reasonable in agreeing to the terms or whether agencies are failing to ensure proper accountability for public employees.

STATEMENT OF FACTS[1]

A. Background Information

Plaintiff Libertarians for Transparent Government (LFTG) is a non-profit organization devoted to transparency and openness in government. Its Executive Director is John Paff, a well-known transparency advocate who has litigated many important cases that have expanded the public's right to access government records. See, e.g., Paff v. Galloway Twp., 229 N.J. 340 (2017) (ensuring access to electronically stored information); Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. 278 (App. Div. 2013) (finding state firemen's association subject to OPRA); Asbury Park Press v. Cty. of Monmouth, 201 N.J. 5 (2010) (consolidated case expanding access to settlement agreements). Mr. Paff publishes several blogs to inform the public about matters of public concern. Three of those blogs, titled "NJ Open Government Notes,"[2] "Random Notes on NJ Government"[3] and "NJ Police Internal Affairs Complaints,"[4] routinely cover misconduct by government employees. [Da5-6].[5] The

[1] This brief serves as a comprehensive brief, replacing Plaintiff's Appellate Division and Petition for Certification briefs.

[2] http://njopengovt.blogspost.com

[3] http://njrandomgovt.blogspot.com

[4] http://njpoliceia.blogspost.com

[5] Da = Defendants' App. Div. Appendix;
Pa = Plaintiff's App. Div. Appendix;
PSa = Plaintiff's Supplemental Brief Appendix

source of Mr. Paff's reporting is largely government records that he obtains through OPRA requests.

In October 2017, a woman incarcerated at the Cumberland County Jail filed a federal lawsuit against Cumberland County and several of its corrections officers, alleging that the officers forced her to engage in non-consensual sex acts in violation of her constitutional rights. See Cantoni v. Cumberland County, et al., Docket No. 1:17-cv-07893-NHL-AMD. [Pa1]. The incarcerated women alleged that one of the corrections officers, Tyrone Ellis, forced her into "performing sex on him on a nearly daily basis" from October 2015 to March 2016. [Pa4]. The media reported about the lawsuit. See Joseph P. Smith, Suit: Cumberland Jail Officers Forced Inmate To Have Sex, Daily Journal (Oct. 8, 2017).

Plaintiff sought to learn more about the lawsuit, as well as whether there were any consequences for corrections officers who allegedly engaged in such egregious behavior. Plaintiff first obtained the meeting minutes of the open public meeting of the Board of the Police and Firemen's Retirement System ("the Pension Board"). [Da6]. According to the Pension Board's March 12, 2018 public meeting minutes, Ellis was served a preliminary notice of disciplinary action (PNDA) in August 2016 for "conduct unbecoming and other sufficient causes arising from and related to alleged improper fraternization with inmates and introduction of contraband into the facility[.]" [Da58]. The PNDA indicated that

during an internal affairs investigation, Ellis "admitted to having inappropriate relationships with two inmates . . . bringing contraband to an inmate, and making up an alias which enabled him to provide [an inmate] with money and to correspond with her through JPAY." [Da58]. Additional evidence that was submitted to the Pension Board evidently demonstrated that it was "undisputed that Tyrone Ellis brought contraband into the prison including bras, underwear, cigarettes and a cellphone." [Da59]. Further, "Ellis communicated with the inmate through a lengthy series of racy texts." Ibid.

Importantly, per the Pension Board's public meeting minutes:

> Prior to the administrative charges being resolved, Mr. Ellis submitted his resignation. However, according to the employer, they threatened to continue prosecuting the disciplinary matter which was when he agreed to cooperate with an investigation of the other alleged acts of improper fraternization which lead to charges against the other officers. As a result of his cooperation, **Cumberland County agreed to dismiss the disciplinary charges and permit Mr. Ellis to retire in good standing.**
>
> [Da59 (emphasis added)]

Ultimately, Ellis was permitted to take his pension but the Pension Board made him forfeit some of his service time.[6] [Da60-61].

[6] It appears Ellis had service credit of 25 years and 8 months. [Da57]. The Pension Board "reduced his service and salary to 20 years, the requisite service credit to qualify for a Service retirement."

B. Plaintiff's July 24, 2018 OPRA Request

Plaintiff sought to confirm the accuracy of the information in the Pension Board minutes and to learn more information about Ellis' separation from employment and whether his agreement with the County provided him any other financial benefits, such as compensation for unused vacation or sick time, extended salary payouts, or health care benefits. Accordingly, on July 24, 2018, Plaintiff filed a request pursuant to OPRA and the common law right of access seeking:

> 1. The August 23, 2016 [PNDA] issued to Tyrone Ellis arising from and relating to his improper fraternization with inmates and introduction of contraband into the Cumberland County Correctional Facility.
>
> 2. The settlement agreement entered into between Ellis and Cumberland County Department of Corrections that was entered into on or about March 1, 2017
>
> 3. For Ellis, his "name, title, position, salary, length of service, date of separation and the reason therefor" in accordance with N.J.S.A. 47:1A-10.
>
> [Da1.]

On July 30, 2018, Cumberland County responded to Plaintiff's OPRA request by denying access to the PNDA and the settlement agreement and providing some information pursuant to N.J.S.A. 47:1A-10. Cumberland County wrote:

> In response to your OPRA request, a Notice of Disciplinary Action cannot be provided with regard to that type of matter pursuant to

> N.J.S.A. 47:1A-10. That section states that notwithstanding the provisions of the Open Public Records Act, or any other law, " . . . the personnel or pension records of any individual in the possession of a public agency including but not limited to records relating to any grievance filed by or against an individual shall not be considered a government record and shall not be made available for public access . . .". The exception is with respect to title, position, salary, payroll record, length of service, date of separation, and the reason therefore. **Officer Ellis was charged with a disciplinary infraction and was terminated**. His title was a Corrections Officer. His yearly salary was $71,575. His date of hire was March 6, 1991. **His date of separation was February 28, 2017.** As indicated above, the reason for the separation was a disciplinary infraction.
>
> There was an agreement with respect to the disciplinary action resulting in separation from employment. However, we cannot, unfortunately, make additional information available as personnel records, including disciplinary records, are confidential. **The settlement agreement pertains to a disciplinary matter** and does not fall under the exception with respect to settlement agreements pertaining to outside litigation under the case of Burnett v. Gloucester County, 415 N.J. Super. 506 (App. Div. 2010). See [also] South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478 (1991). That case also would preclude the release of that type of information.
>
> [Da2 (emphasis added).]

Thus, Cumberland County refused to release even a redacted version of the agreement to Plaintiff so that it could see the terms of the agreement, including whether Ellis received any compensation.

Additionally, the reason the County provided for Ellis' separation from employment contradicted what was in the Pension Board's public meeting minutes. By withholding the agreement, Plaintiff had no ability to confirm whether the Pension Board minutes were accurate or whether Cumberland County's version of events were accurate.

PROCEDURAL HISTORY

A. Plaintiff's Lawsuit

On August 23, 2018, Plaintiff filed a Verified Complaint and Order to Show Cause (OTSC) in the Superior Court of New Jersey, Law Division, Cumberland County. [Da4.] Plaintiff argued that the County's separation agreement with Ellis was "not wholly exempt under OPRA and contains disclosable information that will shed light on the terms of Ellis' separation from employment. . . . At a minimum, it should have been produced in redacted form." [Da8].

Plaintiff also sought "a ruling that Cumberland County violated N.J.S.A. 47:1A-10 by misrepresenting the 'reason' for Ellis' separation from public employment." [Da9]. Plaintiff's Verified Complaint alleged that:

> By indicating that Ellis had been terminated for a disciplinary infraction, it leads the public to believe that Ellis paid a price for his admitted misconduct. In reality, according to the Pension Board's minutes, Cumberland County instead allowed him to retire in good standing." The public deserves to know when employees who engage in misconduct are allowed to leave public employment on good terms.

> [Ibid.]

Plaintiff thus argued that "if the [c]ourt declines to Order Cumberland County to release the agreement . . . it should still compel Cumberland County to certify the accurate reason for Ellis' separation from employment[.]" [Da40].

B. Defendant's Opposition

Cumberland County opposed the OTSC and submitted a Certification of County Counsel Theodore E. Baker. [Da29]. Baker stated that:

> Ellis provided the County with information regarding alleged wrongdoing by other officers in the Department of Corrections, which was the quid pro quo for the Settlement Agreement. That information is already publicly available in the minutes of the Pension Board.
>
> However, as a result of the information Ellis provided to the County, additional information has been discovered and some developments have taken place which not only relate to pending charges against other officers, but may very well lead to additional charges against other officers. Therefore, the information provided by Ellis is still actively under investigation by the County Prosecutor and could result in administrative or criminal charges against other individuals.
>
> [Da30.]

Further, contradicting what the County had stated in its OPRA response, Baker certified that Ellis had "resigned." [Da29]. He provided no additional details regarding whether Ellis had actually been permitted to retire in good standing with a pension.

His certification did not explain why simply redacting such information about the cooperation from within the agreement would not be sufficient to protect any confidentiality interest.

C. The Trial Court's Decision

The Honorable Benjamin C. Telsey, A.J.S.C., heard oral argument and ordered Cumberland County to release the settlement agreement to Plaintiff in redacted form, as Plaintiff had requested. [Da34-Da35]. The court first held that Cumberland County had not "met its burden of proof to show that the entire settlement agreement was a personnel record" and that "[a] defendant simply labeling a document as a personnel record does not make it so, and does not automatically exempt it from disclosure." [Da38]. The Court noted that OPRA's personnel records exemption contained three exceptions and thus, even if the court were to agree that a settlement agreement was a personnel record, "there is still information contained within the settlement agreement which is considered subject to disclosure under OPRA." [Da39]. The court conducted an in camera review of the settlement agreement and found that "there were *provisions* within the settlement agreement that subjected it to exemptions from disclosure and the Court redacted those provisions, to which Plaintiff consented." [Da39]. The court stated those provisions "included information that detailed the particularities of Ellis' cooperation with the Cumberland County Prosecutor's office and any

reference to Ellis' disciplinary infractions." Ibid. The court noted, however, "importantly, after the redaction [there] remained nonexempt information that the public is entitled to access." Ibid.

The court also held that Cumberland County violated N.J.S.A. 47:1A-10 by "misrepresenting the reason for [Ellis'] separation from employment." [Da41]. The court noted that Cumberland County had told Plaintiff that Ellis was "terminated" for a disciplinary infraction whereas "both the Pension Board Meeting Minutes as well as the settlement agreement itself explain that Ellis was allowed to retire from Cumberland County in good standing." [Da40].

The court's decision was memorialized in a October 26, 2018 Consent Order. [Da33]. The Order also sealed portions of the record and provided access to the redacted and un-redacted separation agreement to Plaintiff's counsel, but not to Plaintiff. To date, Plaintiff itself has never seen the agreement.

On December 3, 2018, the parties entered into a second Consent Order settling the amount of attorneys' fees owed to Plaintiff and serving as a final, appealable order. [Da35].

D. The Appellate Division's Decision

Cumberland County appealed the trial court's order requiring disclosure of the settlement agreement. There was no cross-appeal, as Plaintiff did not object to the trial court's redactions.

On September 4, 2020, the Appellate Division issued a published decision. See Libertarians for Transparent Gov't v. Cumberland County, 465 N.J. Super. 11 (App. Div. 2020), certif. granted, 245 N.J. 38 (2021). The Appellate Division concluded that the County's separation agreement with Ellis was wholly exempt from access for several reasons.

First, the court noted that Plaintiff had not sued to pursue access to the PNDA. It reasoned that if "disciplinary records themselves are exempt from disclosure under [N.J.S.A. 47:1A-10], we have difficulty understanding why an internal settlement agreement resolving disciplinary charges, which often involves an employee accepting discipline, would not be similarly considered a personnel record exempt from access." Id. at 21.

Next, the court looked to Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1 (App. Div. 2009), aff'd, 201 N.J. 5 (2010), which held that a settlement agreement that resolved a sexual harassment lawsuit filed by a public employee against a public agency was subject to OPRA. The Appellate Division focused on language in Asbury Park Press that differentiated between settlement agreements that resolve publicly-filed lawsuits and those that resolve internal sexual harassment complaints, which the agency argued was exempt as "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer."

Libertarians, 465 N.J. Super. at 21-22 (citing Asbury Park Press, 406 N.J. Super. at 4-8, and N.J.S.A. 47:1A-1.1). The Appellate Division extended that narrow exemption for documents relating to internal sexual harassment complaints by public employees to *all* agreements between public employees and public employees relating to "internal" matters. It stated that "viewed together," N.J.S.A. 47:1A-1.1 and N.J.S.A. 47:1A-10 "advance a discernible public policy" to "differentiate between internal records maintained by a government entity relating to employee personnel matters, be it disciplinary records, or sexual harassment complaints and investigations, and the public airing of such matters in a civil lawsuit." Libertarians, 465 N.J. Super. at 22.

Finally, the Appellate Division considered whether the separation agreement should be produced in redacted form to disclose the information enumerated in N.J.S.A. 47:1A-10's first exception. The court concluded that "OPRA does not generally require government agencies to make exempt personnel and pension records accessible in redacted form." Libertarians, 465 N.J. Super. at 24. Citing to Governor Byrne's EO11, the court reasoned that "personnel records of government employees have historically been treated differently from other sorts of public records." Id. at 25-26. It did not cite to any case law that had interpreted Eo11, but nonetheless concluded that per EO11, which was later incorporated into OPRA, all an agency needs to do to fulfill its

legal obligations is to tell a requestor an employee's name, title, date of separation, and the reason for separation. Id. at 28-29. Per the Appellate Division, an agency need not produce any actual records with that information to prove that what it was telling the requestor was true. Ibid.

In that regard, the Appellate Division found that Plaintiffs' concern about agencies providing false information was "well-illustrated" in this case and it agreed with Plaintiff "that OPRA was designed to prevent public agencies [from] engaging in inaccurate 'spin.'" Id. at 29. Although it found that the County had not truthfully disclosed Ellis' reason for separation, it did not agree "with the trial court's statement that the County's mischaracterizing Ellis' separation as a termination instead of a resignation" was a reason to release a redacted agreement. Ibid. Instead, it suggested that the trial court had "other measures" available to it, "such as ordering the County to correct the record following the court's in camera review of the withheld documents and awarding the requestor its fees, to address the discrepancy." Ibid.

Despite the fact that Plaintiff had asked the trial court to order the County to correct the record and the trial court found that the County had mischaracterized Ellis' reason for separation and disclosed to Plaintiff that Ellis had in fact been permitted to retire in good standing, the Appellate Division reversed the

award of fees to Plaintiff as a prevailing party because it did not obtain the settlement agreement. It remanded the case back to the trial court to ascertain whether the agreement should be disclosed pursuant to the common law right of access, strongly suggesting that access is appropriate because "[t]he sexual exploitation of inmates and detainees in the Cumberland County jail by corrections officers is undoubtedly a matter of intense public interest, as is the County's decision to permit an officer who admittedly engaged in such wrongdoing to retire in good standing." Id. at 30.

Thereafter, Plaintiff filed a Petition for Certification, which this Court granted. The matter is thus stayed in the trial court and the common law right of access has not been considered.

E. The Incarcerated Woman's Settlement

On October 27, 2020, Cumberland County settled the federal lawsuit with the incarcerated woman in the Cantoni case for $150,000. Mr. Paff obtained the settlement agreement through OPRA, reported about it on one of his blogs, and the media picked up the story. See Matt Gray, Ex-Prisoner Was Paid $150K to Settle Claims That Jail Guards Forced Her to Have Sex With Them, NJ Advance Media (Dec. 1, 2020).

STANDARD OF REVIEW

This Court reviews a lower court's interpretation of OPRA on a de novo basis. See Brennan v. Bergen Cty. Prosecutor's

Office, 233 N.J. 330, 339 (2018); Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 294 (2017). In performing its de novo review, the Court must follow the Legislature's instruction that the public agency has the burden of proof, N.J.S.A. 47:1A-6, and that "any limitation on the right of access . . . *shall be construed in favor of the public's right of access*." N.J.S.A. 47:1A-1 (emphasis added). Accordingly, "doubts on whether a limitation to access exists must be resolved 'in favor of the public's right of access[.]'" Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 366 (App. Div. 2003) (quoting N.J.S.A. 47:1A-1).

The Court must also keep OPRA's primary purpose in mind when it analyzes the issues in this case. OPRA's promise of accessible records enables "citizens and the media [to] play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct." Sussex Commons Assoc., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (quoting Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009). In fact, the "bedrock principle" underlying OPRA is that "our government works best when its activities are well-known to the public it serves." Burnett, 198 N.J. at 414. An informed citizenry is "essential to a well-functioning democracy." Paff v. Twp. of Galloway, 229 N.J. 340 (2017).

The Appellate Division conceded that its decision was "not altogether free from doubt," but it failed to apply the above

standards which would have led it to rule in favor of access. This Court should now apply those standards and construe any doubt in favor of granting access to the redacted agreement pursuant to OPRA.

LEGAL ARGUMENT

I. THE SEPARATION AGREEMENT FALLS WITHIN TWO SEPARATE EXCEPTIONS TO OPRA'S PERSONNEL RECORDS EXEMPTION AND LONGSTANDING CASE LAW REQUIRES THAT IT BE PRODUCED IN REDACTED FORM AT A MININIMUM

N.J.S.A. 47:1A-10, commonly known as the "personnel records exemption," renders most personnel records exempt from public access under OPRA. The personnel records exemption, however, contains three significant exceptions that require disclosure of specific information within records that would otherwise qualify as personnel records. Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 592 (2011). In full, N.J.S.A. 47:1A-10 provides that:

> Notwithstanding the provisions of [OPRA] or any other law to the contrary, **the personnel or pension records of any individual in the possession of a public agency**, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, **except that**:
>
> [1] an individual's name, title, position, salary, payroll record, length of service, **date of separation and the reason therefor**, and the amount and type of any pension received **shall be a government record**;

> [2] **personnel or pension records of any individual shall be accessible when required to be disclosed by another law,** when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
>
> [3] data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.
>
> [N.J.S.A. 47:1A–10 (emphasis added)].

Like every other limitation on the right of access, N.J.S.A. 47:1A-10 is to be construed in favor of the public's right of access. See N.J.S.A. 47:1A-1.

In this case, both the first and second exceptions apply. Plaintiff will address them below in reverse order for simplicity.

A. OPRA Makes All Contracts, Including Contracts Relating To A Public Employee's Employment, Subject To Immediate Access

The County's separation agreement with Ellis is subject to N.J.S.A. 47:1A-10's second exception because it is "required to be disclosed by another law." Pursuant to N.J.S.A. 47:1A-5(e), public agencies must grant "immediate access" to "budgets, bills, vouchers, **contracts**, **including** collective negotiations agreements and **individual employment contracts**, and public employee salary

and overtime information." (emphasis added). The County's separation agreement[7] with Ellis clearly falls within N.J.S.A. 47:1A-5(e)'s disclosure requirement. It is a contract that sets forth the terms of Ellis' separation from public employment, including the fact that he was permitted to retire in good standing. It also provides that Ellis agreed to release all claims that he might have relating to his employment. Although this particular separation agreement does not offer Ellis any additional compensation, very often these separation agreements do. Thus, the separation agreement is not only a general contract that would be subject to immediate access, it is also an "individual employment contract" as contemplated by N.J.S.A. 47:1A-5(e). The County was required to produce it "immediately."

The Appellate Division failed to consider N.J.S.A. 47:1A-5(e)'s disclosure requirement, never once citing the statute in

[7] The County has argued that the agreement is not a "separation agreement" because Ellis had already resigned at the time the agreement was entered into on March 1, 2017. In response to Plaintiff's OPRA request, however, the County stated that Ellis' date of separation was February 28, 2017. [Da2]. Ellis signed the agreement on February 27, 2017, one day prior to his stated date of separation. Clearly the agreement which set forth the terms of his separation was negotiated and it was drafted prior to that date. Moreover, the County's OPRA response stated that "[t]here was *an agreement* with respect to the disciplinary action *resulting in separation from employment*." [Da2]. Nonetheless, whether it is called a "separation agreement" or a "settlement agreement," it is an individual employment contract that set forth the terms and conditions of his separation from employment and it also contains information in N.J.S.A. 47:1A-10's first exception.

its opinion. Had it done so, the statute's plain language would have led it to reach the same conclusion as the trial court: contracts between public agencies and public employers are subject to OPRA and are not wholly exempt pursuant to OPRA's personnel records exemption. Instead, confidential personnel information within the contract should be redacted and the remainder of the agreement should be released. This fulfills N.J.S.A. 47:1A-10's purpose of protecting sensitive personnel information from public view, while also complying with OPRA's express instructions that contracts be disclosed and that records should be produced in redacted form rather than being withheld in their entirety. See N.J.S.A. 47:1A-5(g) ("If the custodian of a government record asserts that part of a particular record is exempt . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt . . . and shall promptly permit access to the remainder of the record.")

Accordingly, because the Legislature has mandated immediate disclosure of contracts, including employment contracts, the second exception to N.J.S.A. 47:1A-10 applies. This Court should reverse the Appellate Division's decision on that basis alone.

B. A Redacted Separation Agreement Must Be Disclosed Because It Contains the Date and Real Reason for Ellis' Separation

Unlike many other cases that come before this Court, the application of N.J.S.A. 47:1A-10's first exception does not

present an issue of first impression. As detailed further below, this Court has already applied the specific legal provision at issue in the past in accordance with its plain language, and, had those decisions been applied in this case, the Appellate Division would have ruled in favor of disclosure. This Court should apply its prior precedent because it is in line with the plain, unambiguous language of the statute; because it is the outcome the Legislature intended and the decision that best fulfills OPRA's primary purpose; and because there is no special justification to reverse course.

The plain language of N.J.S.A. 47:1A-10's first exception provides that a public employee's terms of employment (i.e. name, title, position, and salary), as well as the reason why that particular employee separated from employment and the date that the separation occurred, "shall be a government record." This mandatory disclosure requirement is not new to OPRA; the public has been entitled to this disclosure for more than forty-five years. In 1974, Governor Brendan Byrne issued EO11, which substantively mirrors N.J.S.A. 47:1A-10 almost verbatim. EO11 states:

> Now, Therefore, I, Brendan Byrne, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and statutes of this State, do hereby ORDER and DIRECT
>
> 1. . . .

> 2. **Except as otherwise provided by law** or when essential to the performance of official duties or when authorized by a person in interest, **an instrumentality of government shall not disclose to anyone** other than a person duly authorized by this State or the United States to inspect such information in connection with his official duties, **personnel or pension records of an individual, except that the following shall be public**
>
> a. An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, **date of separation from government service and the reason therefor;** and the amount and type of pension he is receiving;
>
> b. Data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but in no event shall detailed medical or psychological information be released.
>
> [EO11 (emphasis added)].

Thus, although the paragraphs are re-ordered slightly,[8] EO11 also rendered personnel records generally exempt from public access,

[8] The opening of Paragraph 2 is substantively the same as N.J.S.A. 47:1A-10's second exception. Subsection (a) of Paragraph 2 is nearly identical to N.J.S.A. 47:1A-10's first exception. And, Subsection (b) of Paragraph 2 is nearly identical to N.J.S.A. 47:1A-10's third exception.

but contained the same three specific exceptions that N.J.S.A. 47:1A-10 now provides.

Without applying any case law, the Appellate Division cited to EO11 and concluded that the "long-standing understanding of [N.J.S.A. 47:1A-10's] first exception" is that personnel records are wholly exempt and that an agency may satisfy N.J.S.A. 47:1A-10 by simply disclosing an employee's date of and reason for separation either verbally or in writing. Libertarians, 465 N.J. Super. at 29. That has never been the understanding of N.J.S.A. 47:1A-10's first exception, though. Indeed, this Court reached the opposite conclusion nearly 30 years ago. See South Jersey Publishing, 124 N.J. 478.

In South Jersey Publishing, this Court interpreted EO11 for the first time and held that "date of separation" and "the reasons therefor" means that a public agency must disclose the substantive reason an employee separated from employment and that simply stating "resigned" or "terminated" is insufficient as a matter of law when there are actually more details than that to the separation. It also held that the public records that contained such information could not be withheld, although other sensitive personnel information in the records could be redacted.

In South Jersey Publishing, it had been reported that several employees of the Expressway Authority were under scrutiny for misusing government credit cards, including Executive Director

Donald Vass. Id. at 484. In response to media reports, the Authority conducted an investigation. After the investigation concluded, the Authority held an executive session meeting to discuss "personnel matters" relating to Vaas. Not long after, the Authority and Vass negotiated a Memorandum of Agreement regarding the terms and conditions of Vaas' separation from employment via resignation. The terms of the Agreement became known through a resolution that was passed by the Authority in a public meeting, which stated that Vaas would receive his full salary, pension, and fringe benefits through the end of the year (approximately nine months), as well as compensation for all unused vacation and sick time. Id. at 485. The Authority also told the public that the Attorney General had investigated the matter and decided not to pursue criminal charges. Ibid.

A reporter filed a request for a copy of the executive session minutes and the Agreement under the RTKL and the common law right of access, which the Authority denied. Id. at 486. Both the trial court and the Appellate Division held that agencies were permitted to discuss personnel issues in executive session and that disclosing the documents would circumvent the purpose of holding a closed session. Ibid.

The Supreme Court reversed and found that the executive session minutes constituted a "public record" under the RTKL's

definition because they were required by law to be made.[9] The agency argued that the minutes could not be released because E011 banned the disclosure of personnel records, but the Court rejected that argument. The Court noted that although EO11 contained "a general ban on release of personnel records, it authorizes specific disclosure of" an employee's name and reason for separation. Id. at 495. The Court concluded:

> As the executive-session minutes undoubtedly include the reasons for Vass's termination of employment, [EO]11 does not exempt them from disclosure. Rather, similar to disclosure under the Open Public Meetings Act, a court should construe narrowly any possible exceptions to the [RTKL]. Thus, we interpret [EO]11's authorization of disclosure of "reasons" for "separation from the government services" to include the results of the Authority's investigation, as revealed in the executive-session minutes.
>
> [Id. at 496.]

The Court further explained:

> [T]he public interest in disclosure is intended to enable the public to make a sound judgment about the reasonableness of the Authority's decision regarding Vass, which authorized the expenditure of public funds to continue his salary and benefits for a

[9] The RTKL applied only to a very narrow category of records that were "required by law to be made, maintained, or kept on file." N.J.S.A. 47:1A-2. Otherwise, access to public records was limited pursuant to the common law. The Legislature eliminated this requirement when it enacted OPRA and significantly broadened the definition of "government record" so that any document that has been made, maintained or kept on file by a public agency or official, N.J.S.A. 47:1A-1.1, even if there is no law that required them to be made, maintained, or kept on file.

> substantial period of time after his resignation had become effective. Without disclosure of the reasons for Vass's "voluntary separation" from the Authority, the public cannot intelligently make such an evaluation.
>
> [Id. at 498.]

Thus, the Court ordered the meeting minutes to be disclosed because they contained information required by EO11's exception in Paragraph 2(a), which is essentially identical to Section 10's first exception.

As to the Agreement with Vaas, because there was no law that required it to be made, maintained, or kept on file, the Court recognized that it did not fall within the general definition of "public record" under the RTKL and thus the newspaper had no statutory right to access it. However, the Court concluded that the newspaper "nevertheless is entitled to disclosure under the common law." Id. at 496. Because a common law balancing test must be performed by a trial court, the Court remanded and instructed the trial court to keep in mind that the public was entitled to information about Vass' reason for separation per EO11. Id. at 498. The trial court was instructed "to ascertain whether redaction is necessary" to "excise any personal information, such as medical and psychological history." Id. at 499.

Although the Supreme Court remanded and ordered the trial

court to conduct a common law balancing test, it is abundantly clear that had the Agreement fallen under the definition of "public record" under the RTKL because a law required it to be made, maintained, or kept on file, then the Court would have simply compelled disclosure to it for the same reasons it compelled disclosure to the meeting minutes: the document was not exempt as a "personnel record" per EO11 because it contained information about Vass' separation from employment that Paragraph 2(a) of EO11 expressly made public.

South Jersey Publishing is not the only case to apply EO11 in favor of public disclosure of an employee's reason for separation within records that might otherwise contain personnel information. In Atlantic City Convention Center Authority v. South Jersey Publishing Company, Inc., 135 N.J. 53 (1994), the Authority went in to executive session to discuss the performance of its chief officer. The details of the executive session were not divulged but thereafter he either "resigned or was fired" from the Authority. Id. at 57. A newspaper requested the executive session meeting minutes, as well as an audio tape recording of the executive session meeting, so that it could learn more details about the chief officer's separation from employment. The trial court compelled disclosure of the meeting minutes based on South Jersey Publishing but denied access to the

audio tape because it was not a "public record"[10] and because the confidentiality of the detailed discussion in the executive session outweighed the newspaper's interest in disclosure.

Ultimately, the Supreme Court reversed, holding that the tapes did in fact meet the general definition of a "public record" under the common law. It remanded the matter back to the trial court to listen to the tapes and determine whether they should be released.[11] The Court noted that blanket access to audio tapes of closed sessions should not always be granted but advised that "[j]ust as in South Jersey Publishing . . . if the tapes were necessary to determine the 'reasons for the earlier discharge,' the Press might be entitled to that information if it were not fully disclosed by the minutes." Id. at 69.

Therefore, the application of the first exception to the personnel records exemption has already been decided twice by this Court to require disclosure of records[12] that contain an employee's

[10] Because the audio tape was not "required by law to be made, maintained or kept on file," it was not subject to the RTKL. The trial court concluded that it did not constitute a "public record" under the common law either.

[11] The Court noted the unique nature of audio tapes, since they record live conversations and therefore might contain the "graphic details" of the deliberative process. Such a concern is not present in this case as Plaintiff is not seeking any deliberations, but rather is seeking a written agreement that simply provides the terms and conditions for Ellis' separation from employment.

[12] The Appellate Division held that an agency can fulfill N.J.S.A. 47:1A-10 simply by telling a requestor the employee's reason for

date of separation and reason for separation, including a separation agreement that sets forth the terms of an employee's departure from employment. The agreement sought here by Plaintiff meets the general definition of "government record" under OPRA[13] as set forth in N.J.S.A. 47:1A-1.1 and it contains information that the first exception to N.J.S.A. 47:1A-10 expressly states "shall be a government record." Therefore, the agreement falls within the first exception to the personnel records exemption and should be released in redacted form.

Importantly, Plaintiff in this case is not even seeking as detailed of a disclosure as was ordered in South Jersey Publishing and Atlantic City Convention Center. Because Plaintiff already knows the specific disciplinary charges against Ellis from the

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separation. This opens the door to agencies misrepresenting the reason for separation because the requestor has no access to the actual record that would prove otherwise. Indeed, the Appellate Division in this case agreed with Plaintiff that the County had "mischaracteriz[ed]" Ellis' reason for separation by telling Plaintiff he was "charged with a disciplinary infraction and terminated" when he had really been permitted to retire in good standing.

[13] This Court has stated: "[w]hen it enacted OPRA, the Legislature replaced the RTKL's more restrictive view of public access with the current, far broader approach." N. Jersey Media Grp. Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 567 (2017). Thus, even where a provision of OPRA contained the same exact language as the RTKL, the Court refused to construe that language as narrowly as it had been construed under the RTKL. Ibid. In this case, the Appellate Division issued a ruling that gives the public *far less* information than what was available under the RTKL regarding the terms of an employee's departure from public employment.

Pension Board meeting minutes, Plaintiff agreed that the agreement could be produced with significant redactions in hopes that the County would produce it and not appeal. However, if Plaintiff did not have this information and the settlement agreement contained it, it is clear that South Jersey Publishing and Atlantic City Convention Center would require disclosure of those facts because they constitute the "reason" for Ellis' separation from employment. In other words, in other cases where the employee's misconduct that led to separation is not known, such information must be disclosed to satisfy N.J.S.A. 47:1A-10's first exception. Only then can the public be ensured accountability and provided the opportunity to judge the reasonableness of the agency's decision to enter into a contract that lets an employee walk away from serious disciplinary charges with a pension or other large payout.

C. This Court's Prior Decision in Kovalcik Also Mandates Disclosure of a Redacted Separation Agreement

The Appellate Division also ignored this Court's decision in Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581 (2011), which requires documents that contain information enumerated in one of N.J.S.A. 47:1A-10's exceptions to be produced with redactions so that the public can view the non-exempt information. In Kovalcik, a public agency had denied access to a two-page document containing a list of training courses that an detective

had completed. Id. at 587. The Supreme Court began its analysis by recognizing that the list of training courses was clearly a "personnel record." Id. at 593. However, the Court recognized that N.J.S.A. 47:1A-10's third exception states that an individual's "specific experiential, educational or medical qualifications required for government employment . . . shall be a government record." N.J.S.A. 47:1A-10. The Court stated:

> Looking at the plain language of the third exception, the document in dispute can only be found to be within the exception to the exemption if it discloses, *and only to the extent that it discloses*, that Detective Houck had completed specific training or education that was required for her employment as a detective with the Prosecutor's Office.
>
> [Kovalcik, 206 N.J. at 593-94 (emphasis added).]

The Court did not have any information regarding which courses were mandatory in order for the detective to hold her position, so it remanded the matter back to the trial court to apply the Court's analysis. Although the Court did not use the word "redact," by stating that a personnel record should be released "only to the extent that it discloses" information detailed in the third exception, the Court clearly meant that the two-page list of training courses should be released with redactions so that only the required courses are visible.

This approach is further evidenced by the fact that the Court cited to North Jersey Media Group Inc. v. State, Department of

Personnel, 389 N.J. Super. 527 (Law Div. 2006), in support of its analysis. There, a trial court concluded that a police officer's employment application was generally exempt as a personnel record, but it ordered it to be disclosed in redacted form so that the officer's name and education qualifications were disclosed, pursuant to N.J.S.A. 47:1A-10's third exception. This fully comports with OPRA's over-arching principle that favors redaction of records, rather than withholding them in their entirety. See N.J.S.A. 47:1A-5(g).[14]

There is no reason to treat the first and second exceptions to OPRA's personnel record exemption, which are at issue in this case, any differently than its third exception, which was at issue in Kovalcik. All three exceptions enumerate specific types of information and declare that such information "shall be a government record." Therefore, the Appellate Division should have applied Kovalcik and ordered the agreement to be produced, at least in redacted form. Indeed, requiring disclosure with redactions is how lower courts and the Government Records Council (GRC) have always applied the exceptions to the personnel records exemption. See e.g., McGee v. Twp. of E. Amwell, 416 N.J. Super. 602 (App. Div. 2010) (finding that emails can constitute personnel records

[14] The principle of requiring exempt information in public records to be redacted rather than permitting an agency to deny access to an entire document is common in most public records laws. See, e.g., 37A Am. Jur. 2d Freedom of Information Acts § 76.

and affirming GRC's decision to "order[] disclosure" of emails "with all personnel information redacted"). Instead of requiring redacted disclosure, the court issued a published opinion that completely shuts down all access to public employee separation agreements, despite recognizing that its decision was not "altogether free from doubt." Libertarians, 465 N.J. Super. at 24.

D. By Using The Exact Language That This Court Previously Interpreted, the Legislature Intended to Adopt This Court's Prior Interpretation of EO11 When It Enacted N.J.S.A. 47:1A-10

Because the Legislature imported the substance of EO11 directly into OPRA, rules of statutory construction provide that it must have also intended to adopt this Court's prior construction of EO11's language. See Lemke v. Bailey, 41 N.J. 295, 301 (1963) ("The construction of a statute by the courts, supported by . . . continued use of the same language . . . is evidence that such construction is in accordance with the legislative intent."); State in Interest of C.K., 233 N.J. 44, 66 (2018) (observing that the Legislature did not enact legislation that would "signal disagreement" with a prior judicial decision construing a statute); Walder, Sondak, Berkeley & Brogan v. Lipari, 300 N.J. Super. 67, 77 (App. Div.), cert. denied, 151 N.J. 77 (1997)(observing that the principle of statutory construction where a law has been judicially construed applies when the

Legislature re-enacts a substantive provision of law with changes that make no functional difference.). It is especially true that where a provision of law "has been construed by a court of last resort and such statute is thereafter revised, but no change has been made as to that part which has been construed, it is a clear indication of the legislature's adoption of such construction." In re Allen's Estate, 23 N.J. Super. 229 (Ch. Div. 1952). See also Snyder v. Am. Ass'n of Blood Banks, 282 N.J. Super. 23, 42 (App. Div. 1995) ("[W]hen the Legislature, assumed to be familiar with both its own enactments and judicial constructions thereof, amends a statute without affecting a prior construction, it must be deemed to have approved of the judicial interpretation."), aff'd, 144 N.J. 269 (1996). "[C]ourts will not impute a legislative intention to alter an established judicial interpretation absent a 'clear manifestation' of such intent." Coyle v. Bd. of Chosen Freeholders of Warren Cnty., 170 N.J. 260, 267 (2002) (citation omitted).

That principle of statutory construction applies here, as this Court has twice interpreted EO11 in a manner consistent with Plaintiff's position and the Legislature made no substantive changes to EO11's language when it imported it into N.J.S.A. 47:1A-10. Nonetheless, this Court need not only apply that rule of statutory construction in order to reach the conclusion that the Legislature intended to adopt South Jersey Publishing's

interpretation and application of "date of separation and reason therefor" when it imported that same language into OPRA.[15] OPRA's legislative history also reflects an intention to adopt that interpretation.

It took many years to enact OPRA, but the legislation finally gained steam in the 209th Legislature when Senate Bill 866 (S866) and companion Assembly Bill 1309 (A1309) were introduced. Initially, S866 and A1309 were completely silent as to public access to personnel records when the bills were introduced in early 2000. Both bills did recognize, however, that an exemption could be created pursuant to an executive order, among other laws. [PSa1, PSa10].

In a March 9, 2000 public hearing to discuss S866, A1309, and several other bills relating to public records, William J. Kearns, the General Counsel of the League of Municipalities, expressed his concerns regarding how the enactment of OPRA might impact executive orders that were already in place, such as Governor Byrne's EO11. Kearns testified:

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[15] Not only did the Legislature incorporate this same language into OPRA, it did so in a statutory scheme that "replaced and significantly expanded upon the RTKL." Lyndhurst, 229 N.J. at 566 ("When it enacted OPRA, the Legislature replaced the RTKL's more restrictive view of public access with the current, far broader approach."). Thus, this Court should not only apply South Jersey Publishing's holding, but it should recognize that the Legislature intended to provide even *more* transparency than was provided by that decision under the RTKL.

And everyone seems to agree that yes, personnel files, and the information in them, should not be considered public records. The approach taken in Senator Martin's bill says that's already been addressed by executive orders and existing law. My concern is, however, that when you change the law, you change the foundation on which those executive orders were issued. And the executive order, I believe, was issued under Governor Byrne that said that personnel files are, in fact, confidential. That was issued when you had the existing law.

Now you change the law, and you say everything is public. There needs to be then, I believe, a new executive order that would exempt that. We have no indication from the administration that that has been thought about, that that has been looked at, that there will be a new executive order to address that. It seems to me that that needs to be addressed. And simply saying in the bill that items identified by executive order will be exempt -- I think it takes a new executive order, because when you change the law under which the old executive order was adopted, you change the basis for that executive order.

. . .

You change the law defining what is a mandated public record, you've changed the foundation for every one of those cases that have been decided under that. So while I think we agree, probably in principle, on the things that ought to be private and on the things that ought to be included and things that ought to be open, I think that the drafting of the legislation needs to be done carefully. **And I think there needs to be an ability to take a look at the cases that have come down, decided on under the existing law, and if we want to embody that, then let's do that.**

[Public Hearing before Senate Judiciary Comm., Senate Bill Nos. 161, 351, 573, and 866, 209th

> Legislature (Mar. 9, 2000)at 23-24. PSa42-PSa43.]

Senator Robert J. Martin, who sponsored S866, did not understand Mr. Kearns' concerns regarding the impact that expanding the definition of "government records" might have on existing executive orders, given that the first section of S866 and A1309 already provided that records may be exempt pursuant to executive orders. The following exchanged occurred between Senator Martin and Mr. Kearns:

> SENATOR MARTIN: I don't follow that, from a procedural point of view. In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would remain in place. But somehow, you're saying that this would separate out executive orders and require reauthorizations? Let me just reduce it to this. You would acknowledge that there could be a different interpretation of that? And if we had to change this to clarify that existing executive orders remained in place, would that—
>
> MR. KEARNS: And that may address it. That may well address it, Senator. My concern is that the basic principle of legal interpretation is that the most recent enactment of the Legislature is controlling. And obviously, we can all have good faith disagreements on how something would be interpreted on that. You get two lawyers in the room, you're going to get three opinions. We have enough lawyers here that we can certainly disagree on how a court might ultimately address something. I do not think that it is sufficiently clear that we would not have a potential problem with the interpretation, since whatever you enact becomes the most recent.

> SENATOR MARTIN: **If it were clear that the existing executive orders would remain in place, that would satisfy you?**
>
> MR. KEARNS: **That would certainly address the issue of the personnel files.**
>
> [PSa48-PSa49 (emphasis added).]

Shortly after this exchange, on June 26, 2000, A1309 was amended and the language of EO11 was imported nearly verbatim into A1309, reading as what is now N.J.S.A. 47:1A-10. [PSa18]. This legislative testimony and the Legislature's amendments in response to it evidences the Legislature's intent to preserve the provisions of EO11, *as well as the prior case law by this Court that had interpreted it*, i.e. South Jersey Publishing and Atlantic City Convention Center.

E. There Is No Special Justification to Depart from Stare Decisis

"Stare decisis is a principle to which we adhere for the sake of certainty and stability." State v. Shannon, 210 N.J. 225, 226 (2012). This Court has observed that although it may depart from principles of stare decisis in narrow circumstances, "consistent with the practice of other courts of last resort, [the Court has] required 'special justification' to overturn the persuasive force of precedent." State v. Singleton, 211 N.J. 157, 180 (2012). The Court has made it clear that "special justification for disturbing precedent is difficult to establish." Id. at 180.

Importantly, this Court has noted that:

> Statutory-based decisions are less likely to be subject to reconsideration because the legislative branch can correct a mistaken judicial interpretation of a legislative enactment. Indeed, as a principle of statutory construction, the legislative branch is presumed to be aware of judicial constructions of statutory provisions. . . Thus, legislative acquiescence to an interpretation of a statute renders the judicial decision an unlikely candidate for abandoning stare decisis.
>
> [Id. at 180-81 (internal citations omitted).]

Here, it is presumed that the Legislature is was aware of South Jersey Publishing and Atlantic City Convention Center and that it opted not to "correct" the Court's interpretation and application of EO11. Instead, the Legislature adopted those decisions by importing EO11 directly into N.J.S.A. 47:1A-10 without substantively changing its language in any way.

Departure from prior precedent is extremely rare and is done only where a special justification requires it, such as "when the passage of time illuminates that a ruling was poorly reasoned" or "when changed circumstances have eliminated the original rationale for a rule." Luchejko v. City of Hoboken, 207 N.J. 191, 208-09 (2011). In this regard, society certainly has changed since this Court decided South Jersey Publishing and Atlantic City Convention Center Authority, but that change has trended toward even greater government transparency. See, e.g., Burkart Holzner & Leslie

Holzner, Transparency in Global Change: The Vanguard of the Open Society 37-41 (2006) (describing current global trends toward greater transparency); Laurie Kratky Dore, Secrecy by Consent: The Uses and Limits of Confidentiality in the Pursuit of Settlement, 74 Notre Dame L. Rev. 283, 313-16 (1999) (surveying trend toward more "sunshine" in state statutes and common law regarding court records). In fact, the enactment of OPRA itself marked a sea change toward greater transparency in New Jersey. See Lyndhurst, 229 N.J. at 567 ("When it enacted OPRA, the Legislature replaced the RTKL's more restrictive view of public access with the current, far broader approach.").

Accordingly, there is no special justification for departing from the holdings of South Jersey Publishing, Atlantic City Convention Center, or Kovalcik. Doing so would make New Jersey far more secretive than it was decades ago, which should not be tolerated. See also Point III below.

II. THE APPELLATE DIVISION'S PROPOSED ALTERNATIVE FOR ACCESS TO AN EMPLOYEE'S REASON FOR SEPARATION IS UNWORKABLE FOR BOTH RECORDS REQUESTORS AND OUR COURTS

The Appellate Division agreed with Plaintiff that the County falsely responded to its OPRA request by stating that Ellis was "terminated," but it disagreed with the trial court that the proper remedy was to release portions of the agreement that stated the actual reason for separation. Libertarians, 465 N.J. Super. at 29. Instead, the court stated that the trial court should have

utilized other remedies, such as "ordering the County to correct the record following the court's in camera review of the withheld documents and award[ed] the requestor its fees, to address the discrepancy." Ibid. This process is unworkable for both records requestors and our courts.

The purpose of OPRA is to guarantee the public access to *actual records*, so that they do not have to simply trust what the government tells them. The statute is also designed to foster "swift access" to government records, Mason v. City of Hoboken, 196 N.J. 51, 69 (2008), and requestors are generally entitled to access contracts, including employment contracts, "immediately." N.J.S.A 47:1A-5(e). Forcing a requestor to go to court in order to determine if the agency is being truthful about an employee's reason for separation significantly delays access, when such information could instead be swiftly obtained and verified through the production of a redacted separation agreement. Not only would the Appellate Division's proposed process overburden our judges with endless cases where a requestor wanted to verify the accuracy of what an agency said, but it also forces requestors to pay court filing fees and legal fees, as finding an attorney who would take such a case on a contingency basis would be very difficult. An attorney would probably only take such a case on a contingency basis in rare circumstances like this one, where there was some

credible third-party source that suggests the agency's response was wrong.

However, this case demonstrates that even that strong of a case would be nearly impossible for an attorney to take on a contingency basis. In this case, because the Appellate Division found that Plaintiff was not entitled to the settlement agreement under OPRA, it reversed the trial court's award of attorneys' fees. The court failed to consider that its proposed process is exactly what did in fact happen in this case; Plaintiff sought the relief the Appellate Division said was appropriate and the trial court granted that relief. Plaintiff expressly argued that "if the Court declines to Order Cumberland County to release the agreement . . . it should still compel Cumberland County to certify the accurate reason for Elli's separation from employment[.]" [Da40]. See also Da9. In response, the trial court reviewed the agreement in camera, ruled that the County had "violated [OPRA] by misrepresenting the reason for the Employee's separation from employment," and disclosed to Plaintiff that Ellis was not "terminated," but instead was really "allowed to retire from Cumberland County in good standing." [Da40-Da41].

Although the trial court confirmed this fact in a written opinion rather than entering an Order that required the County to "correct the record," which was the relief that Plaintiff sought, that does not negate the fact that there was a finding by the trial

court that the County had mischaracterized Ellis' reason for separation and that the truthful reason for the separation was disclosed to Plaintiff. As a result, Plaintiff was at least a partially prevailing party because it obtained part of the relief it was expressly seeking in this suit.

Accordingly, the Appellate Division's alternative process for obtaining an employee's date of and reason for separation is simply unworkable. The court's decision that Plaintiff was not a prevailing party was also a legal error that should be reversed.[16] If the Court does not do so, then public agencies will be able to lie about an employee's reason for separation and the public will be unable to fund a lawsuit to find out the truth. The Legislature included a mandatory fee-shifting provision in OPRA to empower the public to enforce their statutory rights under OPRA and the public has a statutory right to truthful information about a public employee's reason for separation.

[16] Plaintiff consented to redactions to the agreement and did not cross-appeal any redactions that the trial court made. Had the County decided to comply with the trial court's ruling rather than appealing it, Plaintiff would have been willing to cooperate to permit some additional minor redactions beyond what the court had ordered. If this Court agrees that the production of a redacted agreement was required but believes that additional redactions are necessary, such a ruling should not undermine Plaintiff's status as a prevailing party on appeal because Plaintiff would have consented to the additional redactions. Clearly this case stands for the larger proposition of whether the agreement must be produced at all. If the Court agrees with Plaintiff, then Plaintiff is a prevailing party on that issue.

III. THE COURT'S DECISION IN THIS CASE HAS FAR-REACHING CONSEQUENCES AND CAN PROVIDE NEEDED TRANSPARENCY IN POLICING THAT THE PUBLIC IS DEMANDING

The Court's decision in this case will apply to a separation agreement with a county corrections officer who committed egregious misconduct by sexually abusing incarcerated women, something he evidently admitted to doing as part of negotiating a secret deal to retire with his pension. It is important that the public have greater access to information regarding sexual abuse in our jails and the failure of government to hold corrections officers accountable. But, the decision will have a larger impact – it will apply to *all* government employees, including police officers. Plaintiff has been particularly focused on promoting police transparency and this Court previously granted certification in a case raising a similar legal question and involving a State Trooper who was terminated for "racially offensive behavior." See Libertarians for Transparent Gov't v. State Police, 239 N.J. 518 (2019). That case was dismissed pursuant to a settlement agreement, 243 N.J. 515 (2020), but this case provides the Court the opportunity to ensure that police misconduct is not swept under the rug and that secret agreements do not permit officers who have committed misconduct to move from agency to agency.

Our Attorney General has repeatedly stated over the course of the past year that police transparency is important for building

the community's trust and that having the community's trust makes it easier for law enforcement officers to do their jobs. See, e.g., In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 130 (App. Div.) (discussing Attorney General's reasons for requiring disclosure of the names of officers who received major discipline), certif. granted, 244 N.J. 447 (2020). Numerous law enforcement officials and scholars have also recognized this same principle. See, e.g., U.S. Dep't of Justice, Final Report of the President's Task Force on 21st Century Policing 9 (May 2015) (discussing importance of transparency to building trust); Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information From the Public, 22 CUNY L. Rev. 148, 166 (Winter 2019) ("[W]hen police processes are perceived as procedurally just, communities are more likely to cooperate with the police, and policing, in turn, is more effective."); Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1162 (2000) ("An individual who trusts law enforcement is more likely to follow its commands; conversely, an untrustworthy police force may confront a substantially less obedient citizenry.").

Despite how important community trust is, polls show that more than half of the general public lacks confidence in police officers. See Aimee Ortiz, Confidence in Police Is at Record Low, Gallup Survey Finds, N.Y. Times (Aug. 12, 2020) ("For the first time in its 27 years of measuring attitudes toward the police,

Gallup found that a majority of American adults do not trust law enforcement."). When surveys are broken down by race, the level of trust in police dips even further. Id. (finding that only 19 percent of Black adults had confidence in the police). See also Katherine J. Bies, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, 28 Stan. L. & Pol'y Rev. 109, 120 (2017) ("Research consistently shows that people of color are more likely than white individuals to view law enforcement with suspicion and distrust."). As Justice Albin stated in Paff v. Ocean County Prosecutor's Office, 235 N.J. 1 (2018), "The public -- particularly marginalized communities -- will have greater trust in the police when law enforcement activities are transparent." Id. at 30 (Albin, J., dissenting).

Although the agreement in this case involves a corrections officer, the Court's decision will apply to agreements that police departments enter into with police officers. Often, especially in the context of separation agreements with police officers that have strong union contracts that make it difficult to fire them, these agreements include a dismissal of disciplinary charges and very large payouts in exchange for the officer agreeing to retire (with a pension). See, e.g., S.P. Sullivan, N.J. Police Chief Put Potential Witness' Life In Danger, Got A $177K Payout, Documents Reveal, NJ Advance Media (Jan. 24, 2021) (discussing how a police chief received a very large payout and dismissal of disciplinary

charges in exchange for him voluntarily retiring). The public only knows about such transactions because, consistent with South Jersey Publishing, public agencies have generally released such separation agreements with redactions, as did the agency in the NJ Advance Media story. See, e.g., Vernon Animal Control Officer, Facing Disciplinary Charges, To Resign, NJ Herald (Dec. 22, 2019) (providing a copy of a settlement agreement where officer was allowed to resign to avoid disciplinary charges); Morris County Township Settled Disciplinary Case Against Cop By Allowing Him To Resign In Good Standing, NJ Civil Settlements Blog[17] (Nov. 2, 2019) (linking to settlement agreement where officer agreed to resign if disciplinary charges were dropped); After 9 Years Of Paid Leave, Paterson Drops Charges Against Suspended Cop In $2M Sex Case, Paterson Press (June 28, 2016) (discussing settlement agreement released with redactions to specific disciplinary charges which paid the officer more than $85,000 in exchange for his retirement); Heroin Bust Wasn't Ex-Cop's First Dust Up Over Drugs, Asbury Park Press (May 22, 2015) (discussing copy of settlement agreement that was released and showed that officer who tested positive for drugs was permitted to resign with disciplinary charges withdrawn).

[17] https://bit.ly/3iqft8H

As part of its award-winning "Protecting the Shield" exposé, the *Asbury Park Press* filed OPRA requests for police separation agreements and reported that:

> [We] identified at least 68 instances since 2010 in which law enforcement officers with disciplinary issues were allowed to resign, frequently with their town agreeing to drop disciplinary charges and give a neutral reference to future employers. At least four of those officers made claims they were discriminated against or harassed during their employment.
>
> In the process, the 68 officers collectively banked at least $780,000 in payouts, often tied to unused sick and vacation days, benefits they would normally receive if they retired honorably. Thirty-three of those officers kept their pensions, collectively worth $1.6 million annually.
>
> [Money and Silence Push Along Bad Cops, Asbury Park Press (Jan. 22, 2018).]

As a result of the reporting, the Attorney General quickly issued two directives in March 2018 to try to weed out bad cops by requiring every agency to enact an "early warning" system[18] and requiring every agency to implement random drug testing.[19] See Andrew Ford, NJ Police Brutality: State Targets Bad Cops After Press Investigation, Asbury Park Press (Mar. 20, 2018) (quoting the Attorney General as saying, "I thought the article shines a light on issues that the public should be aware of . . . these two directives are directly aimed at identifying problematic behavior

[18] See Attorney General Law Enforcement Directive 2018-3.
[19] See Attorney General Law Enforcement Directive 2018-2.

in law enforcement officers before that behavior escalates to the point where there might be potential litigation, where an officer engages in some sort of problematic behavior with a civilian"). Had the Appellate Division's published decision been in place at the time the *Asbury Park Press* performed its investigation, this reporting would have been impossible.

In all instances, disclosure of employee separation agreements will fulfill OPRA's primary purpose of "guarding against corruption and misconduct." Burnett, 198 N.J. at 414. See also L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 583 (2019) ("OPRA encourages private citizens to serve as watchdogs guarding against 'wasteful government spending' and 'corruption and misconduct.'"); Sussex Commons, 210 N.J. at 547 (the purpose of OPRA is to disclose records that "expose misconduct or wasteful government spending"); Paff v. N.J. State Firemen's Ass'n, 431 N.J. Super. at 291 (OPRA is designed to "fulfill the legislative intent to inform citizens interested in combating misconduct and corruption"). This concept is not new, as OPRA promotes New Jersey's long "history of commitment to public participation in government and to the corresponding need for an informed citizenry." South Jersey Publishing, 124 N.J. at 486–87.

If public agencies are permitted to ignore N.J.S.A. 47:1A-5(e) and N.J.S.A. 47:1A-10's express disclosure requirements and keep the public from seeing separation agreements or other

contracts with employees simply because they resolve disciplinary charges or are "internal," then OPRA will not actually serve to expose misconduct and corruption at all. The Appellate Division's decision condones secret agreements, which will be abused to give golden parachutes to departing employees.[20] Employees who should be terminated for misconduct can retire or resign in good standing pursuant to a secret agreement with a public agency and then move on to other public employment where they can violate the public's trust all over again. Given New Jersey's notoriety for corruption, the decision below is extremely dangerous.

At a time when the national conversation is so heavily focused on exposing misconduct, especially inmate abuse and police misconduct, the Appellate Division's decision made New Jersey *more* secretive. Its decision has given public agencies permission to enter into private separation agreements with employees who engage in sexual abuse, harassment, racism, excessive force, or other misconduct, depriving the public of any of the details it needs to judge the reasonableness of the agency's actions, contrary to South Jersey Publishing and

[20] In the past, the Appellate Division recognized that because settlement agreements "may provide valuable information regarding the conduct of governmental officials," courts should "reject any narrowing legal position" that "would provide grounds for impeding access to such documents." Burnett v. Cty. of Gloucester, 415 N.J. Super. 506, 517 (App. Div. 2010).

N.J.S.A. 47:1A-10. Letting the Appellate Division's decision stand completely undercuts OPRA's stated purpose. This Court should reverse and restore statewide access to these agreements.

CONCLUSION

For all of the above reasons, this Court should reverse the Appellate Division's decision.

Respectfully Submitted,

/s/ CJ Griffin
CJ Griffin

Dated: April 28, 2021

SENATE, No. 866

STATE OF NEW JERSEY

209th LEGISLATURE

INTRODUCED JANUARY 31, 2000

Sponsored by:
Senator ROBERT J. MARTIN
District 26 (Essex, Morris and Passaic)

SYNOPSIS
Provides public access to government records.

CURRENT VERSION OF TEXT
As introduced.

AN ACT concerning public access to government records, amending and supplementing P.L.1963, c.73 (C.47:1A-1 et seq.) and repleaing parts of the statutory law.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P.L.1963, c.73 (C.47:1A-1) is amended to read as follows:

1. The Legislature finds and declares it to be the public policy of this State that **[**public**]** government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access. All government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5 U.S.C. s.552); federal regulation; or federal order.

(cf: P.L.1963, c.73, s.1)

2. Section 1 of P.L.1995, c.23 (C.47:1A-1.1) is amended to read as follows:

1. As used in this act:

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

"Custodian of a government record" or "custodian" means the head of a public agency having custody or control of a government record or the head's designee or designees.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

that has been received by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[("Local agency" means a county or municipality, and includes a local health board or other local subdivision.

"State agency" means each of the principal departments in the Executive Branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established.]

"Public agency" or "agency" means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

(cf: P.L.1995, c.23, s.1)

3. Section 2 of P.L.1995, c.23 (C.47:1A-1.2) is amended to read as follows:

2. a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, [State and local agencies] a public agency shall not have access to this information except as allowed by federal law.

b. A [State or local agency] public agency shall not make any [information] biotechnology trade secrets and related confidential information it has access to under this act available to any other [State or local agency] public agency, or to the general public, except as allowed pursuant to federal law.

(cf: P.L.1995, c.23, s.2)

4. Section 1 of P.L.1998, c.17 (C.47:1A-2.2) is amended to read as follows:

1. a. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear that a person who is serving a term of imprisonment or is on parole or probation as the result of a conviction of any indictable offense under the laws of this State, any other state or the United

States is seeking [public] government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented shall be denied.

b. [Public] Government records containing personal identifying information which is protected under the provisions of this section may be released to an inmate or his representative only if the information is necessary to assist in the inmate's own defense. A determination that the information is necessary to assist in the inmate's defense shall be made by the court upon motion by the inmate or his representative.
(cf: P.L.1998, c.17, s.1.)

5. Section 3 of P.L.1963, c.73 (C.47:1A-3) is amended to read as follows:

3. Notwithstanding the provisions of [this act] P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any [such body,] public agency, [commission, board, authority or official,] the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or [publication] examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to [prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law] allow any public agency to prohibit access to a record that was open for public inspection, examination, or copying before the investigation commenced.
(cf: P.L.1963, c.73, s.3)

6. (New Section) a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours, unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5 U.S.C. s.552); federal regulation; or federal order. An agency regulation that limits access to government records shall not be retroactive in effect or applied to

deny a request for access to a government record that is pending before the agency or a court at the time of the adoption of the regulation.

b. A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, $0.75 per page; eleventh page to twentieth page, $0.50 per page; all pages over twenty, $0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. If a public agency can show that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

e. The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or

controlled by the public agency. The form shall provide for indication of the name, address, and phone number of the requestor and a brief description of the government record sought, but the requestor shall have the option to not provide a name, address, or phone number. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following: (1) specific directions and procedures for requesting a record; (2) a statement as to whether prepayment of fees or a deposit is required; (3) the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available; (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal; (5) space for the custodian to list reasons if a request is denied in whole or in part; (6) space for the requestor to sign and date the form; (7) space for the custodian to sign and date the form if the request is fulfilled or denied.

f. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

g. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

h. Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving

the request. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request.

i. The files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

7. (New Section) A person who is denied access to a government record by the custodian of the record, at the option of the requestor, (1) may institute a proceeding to challenge the custodian's decision by filing in the Superior Court an action in lieu of prerogative writ or an order to show cause, or both, or (2) if the record to which access is denied is in the custody of a State agency as defined in section 2 of P.L.1968, c. 410 (C.52:14B-2), may have the matter considered a contested case and handled in the manner provided in the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1et seq.); or (3) if the custodian is an officer, official or employee of a municipality or municipal entity, may challenge the custodian's decision by filing a complaint in the municipal court of the municipality in which access was denied.

If a complaint is filed with a municipal court, the court clerk shall transmit the complaint by the end of the second business day following receipt to the assignment judge for the vicinage in which that municipal court is located for assignment of the complaint either to the municipal court in which it was filed or to another municipal court in the vicinage for disposition. The municipal courts in a vicinage in which a complaint is filed shall have jurisdiction of proceedings initiated by such a complaint to enforce the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, notwithstanding N.J.S.2B:12-16 to the contrary. At the request of the requestor who filed a complaint, the municipal prosecutor shall represent the requestor in the proceedings before the municipal court, at no cost to the requestor.

The right to institute any proceeding under this section upon a denial of access shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be

allowed. If a decision of a municipal court finding that access has been improperly denied is appealed, the county prosecutor shall represent the appellee, at the request of the appellee, in the proceedings on the appeal, at no cost to the appellee.

A requestor who prevails in any proceeding instituted under this section shall be entitled to taxed costs, and may be awarded a reasonable attorney's fee. A custodian who prevails in any proceeding instituted under this section shall be entitled to taxed costs.

8. (New Section) Nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented shall be construed as limiting common law access to government records.

9. (New Section) a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in summary proceedings in accordance with "the penalty enforcement law," N.J.S.2A:58-1 et seq., and the rules of court governing actions for the collection of civil penalties. The Superior Court and the municipal courts shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section. An action shall be brought in the name of the State upon the complaint of the Attorney General, the municipal prosecutor of the municipality in which the violation occurred or the county prosecutor of the county in which the violation occurred.

The court also may recommend to an appropriate entity that appropriate disciplinary proceedings be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

10. Section 2 of P.L.1963, c.73 (C.47:1A-2), section 8 of P.L.1994, c.140 (C.47:1A-2.1) and section 4 of P.L.1963, c.73 (C.47:1A-4) are repealed.

11. This act shall take effect on the first day of the third month following enactment.

STATEMENT

The purpose of this bill is to provide public access to government records. The bill amends current law (P.L.1963, c.73; C.47:1A-1 et seq.) to affirmatively state the public's right to access all government

records (section 1) and the manner in which that access is to provided by the custodian of a government record (section 6). Government records would be exempt from public access only if exempt by: N.J.S.A.47:1A-1 et seq. as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5 U.S.C. s.552); federal regulation; or federal order.

The bill provides a comprehensive definition for "government record" and "public agency" (section 2), amends current sections of law to ensure that wording in these sections correspond to the new terms used in the bill (sections 3, 4 and 5), and revises the procedures by which a requestor who is denied access may challenge the denial in Superior Court, through the administrative law process, or in municipal court (with certain additional assistance provided to those who file complaints in municipal court) (section 7). The bill specifies that its provisions shall not be construed to limit the common law access to government records (section 8). Finally, the bill establishes civil monetary penalties that may be imposed against a public official, officer, employee or custodian who knowingly and willfully violates the law governing the right to public access (section 9).

The bill repeals N.J.S.A.47:1A-2 which deals with the right of inspection of public records, how copies are to be provided and the fees that may be charged; N.J.S.A.47:1A-2.1 which deals with the right to receive printed copies of data or image processed documents; and N.J.S.A.47:1A-4 which deals with proceedings to enforce the right to inspect or copy records. The provisions of these three sections are dealt with in the new sections in this bill.

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

209th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2000 SESSION

Sponsored by:
Assemblyman GEORGE F. GEIST
District 4 (Camden and Gloucester)
Assemblyman JACK COLLINS
District 3 (Salem, Cumberland and Gloucester)

Co-Sponsored by:
Assemblymen Asselta, Augustine, Assemblywoman Heck, Assemblyman R.Smith and Assemblywoman Greenstein

SYNOPSIS

Provides public access to government records.

CURRENT VERSION OF TEXT

As introduced.

(Sponsorship Updated As Of: 3/7/2000)

AN ACT concerning public access to government records and amending and supplementing P.L.1963, c.73 (C.47:1A-1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P.L.1963, c.73 (C.47:1A-1) is amended to read as follows:

1. The Legislature finds and declares it to be the public policy of this State that [public] government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access. All government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5 U.S.C. s.552); federal regulation; or federal order.

(cf: P.L.1963, c.73, s.1)

2. Section 1 of P.L.1995, c.23 (C.47:1A-1.1) is amended to read as follows:

1. As used in this act:

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

"Custodian of a government record" or "custodian" means the head of a public agency having custody or control of a government record or the head's designee or designees.

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received by any such officer, commission, agency, or

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

["Local agency" means a county or municipality, and includes a local health board or other local subdivision.

"State agency" means each of the principal departments in the Executive Branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established.]

"Public agency" or "agency" means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

(cf: P.L.1995, c.23, s.1)

3. Section 2 of P.L.1995, c.23 (C.47:1A-1.2) is amended to read as follows:

2. a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, [State and local agencies] a public agency shall not have access to this information except as allowed by federal law.

b. A [State or local agency] public agency shall not make any [information] biotechnology trade secrets and related confidential information it has access to under this act available to any other [State or local agency] public agency, or to the general public, except as allowed pursuant to federal law.

(cf: P.L.1995, c.23, s.2)

4. Section 1 of P.L.1998, c.17 (C.47:1A-2.2) is amended to read as follows:

1. a. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear that a person who is serving a term of imprisonment or is on parole or probation as the result of a conviction of any indictable offense under the laws of this State, any other state or the United

States is seeking [public] government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented shall be denied.

b. [Public] Government records containing personal identifying information which is protected under the provisions of this section may be released to an inmate or his representative only if the information is necessary to assist in the inmate's own defense. A determination that the information is necessary to assist in the inmate's defense shall be made by the court upon motion by the inmate or his representative.
(cf: P.L.1998, c.17, s.1.)

5. Section 3 of P.L.1963, c.73 (C.47:1A-3) is amended to read as follows:

3. Notwithstanding the provisions of [this act] P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any [such body,] public agency, [commission, board, authority or official,] the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or [publication] examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to [prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law] allow any public agency to prohibit access to a record that was open for public inspection, examination, or copying before the investigation commenced.
(cf: P.L.1963, c.73, s.3)

6. (New Section) a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours, unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5 U.S.C. s.552); federal regulation; or federal order. An agency regulation that limits access to

government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency or a court at the time of the adoption of the regulation.

b. A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, $0.75 per page; eleventh page to twentieth page, $0.50 per page; all pages over twenty, $0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy. If a public agency can show that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

e. The custodian of a public agency shall adopt a form for the use

of any person who requests access to a government record held or controlled by the public agency. The form shall provide for indication of the name, address, and phone number of the requestor and a brief description of the government record sought, but the requestor shall have the option to not provide a name, address, or phone number. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following: (1) specific directions and procedures for requesting a record; (2) a statement as to whether prepayment of fees or a deposit is required; (3) the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available; (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal; (5) space for the custodian to list reasons if a request is denied in whole or in part; (6) space for the requestor to sign and date the form; (7) space for the custodian to sign and date the form if the request is fulfilled or denied.

f. A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

g. Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

h. Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant or deny a request for access to a government record as

soon as possible, but not later than seven business days after receiving the request. In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original request.

i. The files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

7. (New Section) A person who is denied access to a government record by the custodian of the record, at the option of the requestor, (1) may institute a proceeding to challenge the custodian's decision by filing in the Superior Court an action in lieu of prerogative writ or an order to show cause, or both, or (2) if the record to which access is denied is in the custody of a State agency as defined in section 2 of P.L.1968, c. 410 (C.52:14B-2), may have the matter considered a contested case and handled in the manner provided in the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1et seq.); or (3) if the custodian is an officer, official or employee of a municipality or municipal entity, may challenge the custodian's decision by filing a complaint in the municipal court of the municipality in which access was denied.

If a complaint is filed with a municipal court, the court clerk shall transmit the complaint by the end of the second business day following receipt to the assignment judge for the vicinage in which that municipal court is located for assignment of the complaint either to the municipal court in which it was filed or to another municipal court in the vicinage for disposition. The municipal courts in a vicinage in which a complaint is filed shall have jurisdiction of proceedings initiated by such a complaint to enforce the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, notwithstanding N.J.S.2B:12-16 to the contrary. At the request of the requestor who filed a complaint, the municipal prosecutor shall represent the requestor in the proceedings before the municipal court, at no cost to the requestor.

The right to institute any proceeding under this section upon a denial of access shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been

improperly denied, the court or agency head shall order that access be allowed. If a decision of a municipal court finding that access has been improperly denied is appealed, the county prosecutor shall represent the appellee, at the request of the appellee, in the proceedings on the appeal, at no cost to the appellee.

A requestor who prevails in any proceeding instituted under this section shall be entitled to taxed costs, and may be awarded a reasonable attorney's fee. A custodian who prevails in any proceeding instituted under this section shall be entitled to taxed costs.

8. (New Section) Nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented shall be construed as limiting common law access to government records.

9. (New Section) a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in summary proceedings in accordance with "the penalty enforcement law," N.J.S.2A:58-1 et seq., and the rules of court governing actions for the collection of civil penalties. The Superior Court and the municipal courts shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section. An action shall be brought in the name of the State upon the complaint of the Attorney General, the municipal prosecutor of the municipality in which the violation occurred or the county prosecutor of the county in which the violation occurred.

The court also may recommend to an appropriate entity that appropriate disciplinary proceedings be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

10. Section 2 of P.L.1963, c.73 (C.47:1A-2), section 8 of P.L.1994, c.140 (C.47:1A-2.1) and section 4 of P.L.1963, c.73 (C.47:1A-4) are repealed.

11. This act shall take effect on the first day of the third month following enactment.

STATEMENT

The purpose of this bill is to provide public access to government records. The bill amends current law (P.L.1963, c.73; C.47:1A-1 et

seq.) to affirmatively state the public's right to access all government records (section 1) and the manner in which that access is to provided by the custodian of a government record (section 6). Government records would be exempt from public access only if exempt by: N.J.S.A.47:1A-1 et seq. as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, other than the federal Freedom of Information Act (5_U.S.C. s.552); federal regulation; or federal order.

The bill provides a comprehensive definition for "government record" and "public agency" (section 2), amends current sections of law to ensure that wording in these sections correspond to the new terms used in the bill (sections 3, 4 and 5), and revises the procedures by which a requestor who is denied access may challenge the denial in Superior Court, through the administrative law process, or in municipal court (with certain additional assistance provided to those who file complaints in municipal court) (section 7). The bill specifies that its provisions shall not be construed to limit the common law access to government records (section 8). Finally, the bill establishes civil monetary penalties that may be imposed against a public official, officer, employee or custodian who knowingly and willfully violates the law governing the right to public access (section 9).

The bill repeals N.J.S.A.47:1A-2 which deals with the right of inspection of public records, how copies are to be provided and the fees that may be charged; N.J.S.A.47:1A-2.1 which deals with the right to receive printed copies of data or image processed documents; and N.J.S.A.47:1A-4 which deals with proceedings to enforce the right to inspect or copy records. The provisions of these three sections are dealt with in the new sections in this bill.

STATEMENT TO

[Second Reprint]
ASSEMBLY, No. 1309

with Assembly Floor Amendments
(Proposed By Assemblyman COLLINS)

ADOPTED: JUNE 26, 2000

These amendments provide that:

(1) in order to be publicly accessible, a government record must have been made, maintained or kept on file in the course of official business;

(2) when a government record is stored, archived or consists of more than 100 pages, the custodian may exceed the usual seven days provided by the bill to grant or deny access if the custodian advises when the record can be made available and the failure to produce the record by that date will constitute a denial of access;

(3) the bill's provisions will not abrogate any existing exemption of a public record or government record from public access established by law, legislative resolution, regulation, Executive Order of the Governor, court rule, federal law or regulation, or federal order;

(4) the bill's provisions will not abrogate or erode any existing executive or legislative privilege or grant of confidentiality established or recognized by the State Constitution, statute, court rule or judicial case law, which may be claimed to restrict public access to a public record or government record;

(5) the personnel or pension records of any individual in the possession of a public agency will not be considered a government record and will not be made available for public access, except that the following information will be accessible:

(a) an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received;

(b) personnel or pension records of any individual when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person authorized by this State or the United States, or when authorized by an individual in interest; and

(c) data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information; and

(6) an official must have unreasonably denied access under the totality of the circumstances in order to be subject to the bill's penalty provisions.

[Fourth Reprint]

ASSEMBLY, No. 1309

STATE OF NEW JERSEY

209th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2000 SESSION

Sponsored by:
Assemblyman GEORGE F. GEIST
District 4 (Camden and Gloucester)
Assemblyman JACK COLLINS
District 3 (Salem, Cumberland and Gloucester)

Co-Sponsored by:
Assemblymen Asselta, Augustine, Assemblywoman Heck, Assemblyman R.Smith, Assemblywoman Greenstein, Assemblymen Conaway, Conners, Greenwald, LeFevre, Assemblywoman Previte, Assemblymen Thompson, Holzapfel, Azzolina, Assemblywoman Weinberg, Senators Martin, Baer, Turner and Vitale

SYNOPSIS

Provides for public access to government records; protects certain government records from public disclosure; establishes Privacy Study Commission and appropriates $95,000 to commission.

CURRENT VERSION OF TEXT

As amended by the Senate on May 3, 2001.

(Sponsorship Updated As Of: 5/15/2001)

AN ACT concerning public access to government records [4][and][4] [4],[4] amending and supplementing P.L.1963, c.73 (C.47:1A-1 et seq.) [4], amending P.L.1995, c.23 and P.L.1998, c.17, establishing a Privacy Study Commission and making an appropriation for the expenses thereof, and repealing parts of the statutory law[4].

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of P.L.1963, c.73 (C.47:1A-1) is amended to read as follows:

1. The Legislature finds and declares it to be the public policy of this State that [public] [4]:[4]

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access [4][.] :[4]

[4][All] all[4] government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, [4][other than the federal Freedom of Information Act (5 U.S.C.s.552);][4] federal regulation[4][:],[4] or federal order [4];

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency[4].

(cf: P.L.1963, c.73, s.1)

2. Section 1 of P.L.1995, c.23 (C.47:1A-1.1) is amended to read as follows:

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
[1] Assembly ASG committee amendments adopted March 6, 2000.
[2] Assembly floor amendments adopted March 27, 2000.
[3] Assembly floor amendments adopted June 26, 2000.
[4] Senate floor amendments adopted May 3, 2001.

1. As used in [1][this act] P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented[1] :

"Biotechnology" means any technique that uses living organisms, or parts of living organisms, to make or modify products, to improve plants or animals, or to develop micro-organisms for specific uses; including the industrial use of recombinant DNA, cell fusion, and novel bioprocessing techniques.

"Custodian of a government record" or "custodian" means [1][the head of a public agency having custody or control of a government record or the head's designee or designees] [4][.][4] in the case of a municipality, the municipal clerk and in the case of any other public agency, the officer officially designated by formal action of that agency's director or governing body, as the case may be[1] .

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file [3]in the course of his or its official business[3] by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received [4]in the course of his or its official business[4] by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[4]A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

criminal investigatory records;

victims' records, except that a victim of a crime shall have access to the victim's own records;

trade secrets and proprietary commercial or financial information obtained from any source. For the purposes of this paragraph, trade secrets shall include data processing software obtained by a public body under a licensing agreement which prohibits its disclosure;

any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;

administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security;

emergency or security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein;

security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;

information which, if disclosed, would give an advantage to competitors or bidders;

information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position;

information which is a communication between a public agency and its insurance carrier, administrative service organization or risk management office;

information which is to be kept confidential pursuant to court order; and

that portion of any document which discloses the social security number, credit card number, unlisted telephone number or driver license number of any person; except for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof, or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4); and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor.

A government record shall not include, with regard to any public institution of higher education, the following information which is deemed to be privileged and confidential:

pedagogical, scholarly and/or academic research records and/or the specific details of any research project conducted under the auspices of a public higher education institution in New Jersey, including, but not limited to research, development information, testing procedures, or information regarding test participants, related to the development or testing of any pharmaceutical or pharmaceutical delivery system, except that a custodian may not deny inspection of a government record or part thereof that gives the name, title, expenditures, source and amounts of funding and date when the final project summary of any research will be available;

test questions, scoring keys and other examination data pertaining to the administration of an examination for employment or academic

examination;

records of pursuit of charitable contributions or records containing the identity of a donor of a gift if the donor requires non-disclosure of the donor's identity as a condition of making the gift provided that the donor has not received any benefits of or from the institution of higher education in connection with such gift other than a request for memorialization or dedication;

valuable or rare collections of books and/or documents obtained by gift, grant, bequest or devise conditioned upon limited public access;

information contained on individual admission applications; and

information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student.[4]

[**"Local agency" means a county or municipality, and includes a local health board or other local subdivision.

"State agency" means each of the principal departments in the Executive Branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established.**]

"Public agency" or "agency" means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

[4]"Law enforcement agency" means a public agency, or part thereof, determined by the Attorney General to have law enforcement responsibilities.

"Criminal investigatory record" means a record which is not required by law to be made, maintained or kept on file that is held by a law enforcement agency which pertains to any criminal investigation or related civil enforcement proceeding.

"Victim's record" means an individually-identifiable file or document held by a victims' rights agency which pertains directly to a victim of a crime except that a victim of a crime shall have access to the victim's own records.

"Victim of a crime" means a person who has suffered personal or psychological injury or death or incurs loss of or injury to personal or

real property as a result of a crime, or if such a person is deceased or incapacitated, a member of that person's immediate family.

"Victims' rights agency" means a public agency, or part thereof, the primary responsibility of which is providing services, including but not limited to food, shelter, or clothing, medical, psychiatric, psychological or legal services or referrals, information and referral services, counseling and support services, or financial services to victims of crimes, including victims of sexual assault, domestic violence, violent crime, child endangerment, child abuse or child neglect, and the Victims of Crime Compensation Board, established pursuant to P.L.1971, c.317 (C.52:4B-1 et seq.).[4]

(cf: P.L.1995, c.23, s.1)

3. Section 2 of P.L.1995, c.23 (C.47:1A-1.2) is amended to read as follows:

2. a. When federal law or regulation requires the submission of biotechnology trade secrets and related confidential information, [State and local agencies] a public agency shall not have access to this information except as allowed by federal law.

b. A [State or local agency] public agency shall not make any [information] biotechnology trade secrets and related confidential information it has access to under this act available to any other [State or local agency] public agency, or to the general public, except as allowed pursuant to federal law.

(cf: P.L.1995, c.23, s.2)

4. Section 1 of P.L.1998, c.17 (C.47:1A-2.2) is amended to read as follows:

1. a. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.) or the provisions of any other law to the contrary, where it shall appear that a person who is [4][serving a term of imprisonment or is on parole or probation as the result of a conviction] convicted[4] of any indictable offense under the laws of this State, any other state or the United States is seeking [public] government records containing personal information pertaining to the person's victim or the victim's family, including but not limited to a victim's home address, home telephone number, work or school address, work telephone number, social security account number, medical history or any other identifying information, the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented shall be denied.

b. [Public] [4][Government records] A government record[4] containing personal identifying information which is protected under the provisions of this section may be released [4][to an inmate or his representative][4] only if the information is necessary to assist in the

[4][inmate's own][4] defense [4]of the requestor[4]. A determination that the information is necessary to assist in the [4][inmate's] requestor's [4] defense shall be made by the court upon motion by the [4][inmate] requestor[4] or his representative.

[4]c. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, or any other law to the contrary, a custodian shall not comply with an anonymous request for a government record which is protected under the provisions of this section.[4]

(cf: P.L.1998, c.17, s.1.)

5. Section 3 of P.L.1963, c.73 (C.47:1A-3) is amended to read as follows:

3. [4]a.[4] Notwithstanding the provisions of [this act] P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, where it shall appear that the record or records which are sought to be inspected, copied, or examined shall pertain to an investigation in progress by any [such body,] public agency, [commission, board, authority or official,] the right of [examination herein] access provided for in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented may be denied if the inspection, copying or [publication] examination of such record or records shall be inimical to the public interest; provided, however, that this provision shall not be construed to [prohibit any such body, agency, commission, board, authority or official from opening such record or records for public examination if not otherwise prohibited by law] allow any public agency to prohibit access to a record [4]of that agency[4] that was open for public inspection, examination, or copying before the investigation commenced. [4]Whenever a public agency, during the course of an investigation, obtains from another public agency a government record that was open for public inspection, examination or copying before the investigation commenced, the investigating agency shall provide the other agency with sufficient access to the record to allow the other agency to comply with requests made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.).[4]

[4]b. Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, the following information concerning a criminal investigation shall be available to the public within 24 hours or as soon as practicable, of a request for such information:

where a crime has been reported but no arrest yet made, information as to the type of crime, time, location and type of weapon, if any;

if an arrest has been made, information as to the name, address and age of any victims unless there has not been sufficient opportunity for

notification of next of kin of any victims of injury and/or death to any such victim or where the release of the names of any victim would be contrary to existing law or Court Rule. In deciding on the release of information as to the identity of a victim, the safety of the victim and the victim's family, and the integrity of any ongoing investigation, shall be considered;

if an arrest has been made, information as to the defendant's name, age, residence, occupation, marital status and similar background information and, the identity of the complaining party unless the release of such information is contrary to existing law or Court Rule;

information as to the text of any charges such as the complaint, accusation and indictment unless sealed by the court or unless the release of such information is contrary to existing law or court rule;

information as to the identity of the investigating and arresting personnel and agency and the length of the investigation;

information of the circumstances immediately surrounding the arrest, including but not limited to the time and place of the arrest, resistance, if any, pursuit, possession and nature and use of weapons and ammunition by the suspect and by the police; and

information as to circumstances surrounding bail, whether it was posted and the amount thereof.

Notwithstanding any other provision of this subsection, where it shall appear that the information requested or to be examined will jeopardize the safety of any person or jeopardize any investigation in progress or may be otherwise inappropriate to release, such information may be withheld. This exception shall be narrowly construed to prevent disclosure of information that would be harmful to a bona fide law enforcement purpose or the public safety. Whenever a law enforcement official determines that it is necessary to withhold information, the official shall issue a brief statement explaining the decision.[4]

(cf: P.L.1963, c.73, s.3)

6. (New Section) a. The custodian of a government record shall permit the record to be inspected, examined, and copied by any person during regular business hours [4][,] ; or in the case of a municipality having a population of 5,000 or fewer according to the most recent federal decennial census, a board of education having a total district enrollment of 500 or fewer, or a public authority having less than $10 million in assets, during not less than six regular business hours over not less than three business days per week or the entity's regularly-scheduled business hours, whichever is less;[4] unless a government record is exempt from public access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor;

Executive Order of the Governor; Rules of Court; any federal law [4][, other than the federal Freedom of Information Act (5 U.S.C.s.552)][4]; federal regulation; or federal order. [4][An agency] Prior to allowing access to any government record, the custodian thereof shall redact from that record any information which discloses the social security number, credit card number, unlisted telephone number, or driver license number of any person ; except for use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf thereof, or any private person or entity seeking to enforce payment of court-ordered child support; except with respect to the disclosure of driver information by the Division of Motor Vehicles as permitted by section 2 of P.L.1997, c.188 (C.39:2-3.4); and except that a social security number contained in a record required by law to be made, maintained or kept on file by a public agency shall be disclosed when access to the document or disclosure of that information is not otherwise prohibited by State or federal law, regulation or order or by State statute, resolution of either or both houses of the Legislature, Executive Order of the Governor, rule of court or regulation promulgated under the authority of any statute or executive order of the Governor. Except where an agency can demonstrate an emergent need, a[4] regulation that limits access to government records shall not be retroactive in effect or applied to deny a request for access to a government record that is pending before the agency [4], the council[4] or a court at the time of the adoption of the regulation.

b. A copy or copies of a government record may be purchased by any person upon payment of the fee prescribed by law or regulation, or if a fee is not prescribed by law or regulation, upon payment of the actual cost of duplicating the record. Except as otherwise provided by law or regulation, the fee assessed for the duplication of a government record embodied in the form of printed matter shall not exceed the following: first page to tenth page, $0.75 per page; eleventh page to twentieth page, $0.50 per page; all pages over twenty, $0.25 per page. The actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy [1] except as provided for in subsection c. of this section[1]. If a public agency can [4][show] demonstrate[4] that its actual costs for duplication of a government record exceed the foregoing rates, the public agency shall be permitted to charge the actual cost of duplicating the record.

c. Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an extraordinary expenditure of

time and effort to accommodate the request, the public agency may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies [4]: provided, however, that in the case of a municipality, rates for the duplication of particular records when the actual cost of copying exceeds the foregoing rates shall be established in advance by ordinance[4]. The requestor shall have the opportunity to review and object to the charge prior to it being incurred.

d. A custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium. If the public agency does not maintain the record in the medium requested, the custodian shall either convert the record to the medium requested or provide a copy in some other meaningful medium. If a request is for a record: (1) in a medium not routinely used by the agency; (2) not routinely developed or maintained by an agency; or (3) requiring a substantial amount of manipulation or programming of information technology, the agency may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on the cost for any extensive use of information technology, or for the labor cost of personnel providing the service, that is actually incurred by the agency or attributable to the agency for the programming, clerical, and supervisory assistance required, or both.

e. [4]Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.

f.[4] The custodian of a public agency shall adopt a form for the use of any person who requests access to a government record held or controlled by the public agency. The form shall provide [4][for indication of] space for[4] the name, address, and phone number of the requestor and a brief description of the government record sought [4][, but the requestor shall have the option to not provide a name, address, or phone number][4]. The form shall include space for the custodian to indicate which record will be made available, when the record will be available, and the fees to be charged. The form shall also include the following: (1) specific directions and procedures for requesting a record; (2) a statement as to whether prepayment of fees or a deposit is required; (3) the time period within which the public agency is required by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, to make the record available; (4) a statement of the requestor's right to challenge a decision by the public agency to deny access and the procedure for filing an appeal; (5) space for the custodian to list reasons if a request is denied in whole or in part; (6) space for the requestor to sign and date the form; (7) space for the

custodian to sign and date the form if the request is fulfilled or denied. [1]The custodian may require a deposit against costs for reproducing documents sought through an anonymous request whenever the custodian anticipates that the information thus requested will cost in excess of [4][$15] $5[4] to reproduce.[1]

[4][f.] g.[4] A request for access to a government record shall be in writing and hand-delivered, mailed, transmitted electronically, or otherwise conveyed to the appropriate custodian. A custodian shall promptly comply with a request to inspect, examine, copy, or provide a copy of a government record. If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form [4]and provide the requestor with a copy thereof[4]. If the custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record. If the government record requested is temporarily unavailable because it is in use or in storage, the custodian shall so advise the requestor and shall make arrangements to promptly make available a copy of the record. If a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.

[4][g.] h.[4] Any officer or employee of a public agency who receives a request for access to a government record shall forward the request to the custodian of the record or direct the requestor to the custodian of the record.

[4][h.] i.[4] Unless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant [1]access to a government record[1] or deny a request for access to a government record as soon as possible, but not later than seven business days after receiving the request [3]. provided that the record is currently available and not in storage or archived [4][and the record consists of a total of 100 or fewer pages[3].][4] In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request, unless the requestor has elected not to provide a name, address or telephone number, or other means of contacting the requestor. If the requestor has elected not to provide a name, address, or telephone number, or other means of contacting the requestor, the custodian shall not be required to respond until the requestor reappears before the custodian seeking a response to the original

request. [3]If the government record is in storage or archived [4][or exceeds 100 pages][4] , the requestor shall be so advised within seven business days after the custodian receives the request. The requestor shall be advised by the custodian when the record can be made available. If the record is not made available by that time, access shall be deemed denied.[3]

[4][i.] j. A custodian shall post prominently in public view in the part or parts of the office or offices of the custodian that are open to or frequented by the public a statement that sets forth in clear, concise and specific terms the right to appeal a denial of, or failure to provide, access to a government record by any person for inspection, examination, or copying or for purchase of copies thereof and the procedure by which an appeal may be filed.

k.[4] The files maintained by the Office of the Public Defender that relate to the handling of any case shall be considered confidential and shall not be open to inspection by any person unless authorized by law, court order, or the State Public Defender.

7. (New Section) A person who is denied access to a government record by the custodian of the record, at the option of the requestor, [4][(1)][4] may [4][institute a proceeding to challenge the custodian's decision by filing in the Superior Court an action in lieu of prerogative writ or an order to show cause, or both, or (2) if the record to which access is denied is in the custody of a State agency as defined in section 2 of P.L.1968, c.410 (C.52:14B-2), may have the matter considered a contested case and handled in the manner provided in the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1et seq.); or (3) if the custodian is an officer, official or employee of a municipality or municipal entity [2].of a county or county entity, or of a board of education[2], may challenge the custodian's decision by filing a complaint in the municipal court of the municipality in which access was denied.

If a complaint is filed with a municipal court, the court clerk shall transmit the complaint by the end of the second business day following receipt to the assignment judge for the vicinage in which that municipal court is located for assignment of the complaint either to the municipal court in which it was filed or to another municipal court in the vicinage for disposition. The municipal courts in a vicinage in which a complaint is filed shall have jurisdiction of proceedings initiated by such a complaint to enforce the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, notwithstanding N.J.S.2B:12-16 to the contrary. At the request of the requestor who filed a complaint, the municipal prosecutor shall represent the requestor in the proceedings before the municipal court, at no cost to the requestor][:]

institute a proceeding to challenge the custodian's decision by filing

an action in Superior Court which shall be heard in the vicinage where it is filed by a Superior Court Judge who has been designated to hear such cases because of that judge's knowledge and expertise in matters relating to access to government records; or

in lieu of filing an action in Superior Court, file a complaint with the Government Records Council established pursuant to section 8 of P.L. , c. (C.) (now pending before the Legislature as this bill)[4].

The right to institute any proceeding under this section [4][upon a denial of access][4] shall be solely that of the requestor. Any such proceeding shall proceed in a summary or expedited manner. The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed. [4][If a decision of a municipal court finding that access has been improperly denied is appealed, the county prosecutor shall represent the appellee, at the request of the appellee, in the proceedings on the appeal, at no cost to the appellee.][4] A requestor who prevails in any proceeding [4][instituted under this section][4] shall be entitled to [4][taxed costs, and may be awarded][4] a reasonable attorney's fee. [4][A custodian who prevails in any proceeding instituted under this section shall be entitled to taxed costs.][4]

[4]8. (New section) a. There is established in the Department of Community Affairs a Government Records Council. The council shall consist of the Commissioner of Community Affairs or the commissioner's designee, the Commissioner of Education or the commissioner's designee, and three public members appointed by the Governor, with the advice and consent of the Senate, not more than two of whom shall be of the same political party. The three public members shall serve during the term of the Governor making the appointment and until the appointment of a successor. A public member shall not hold any other State or local elected or appointed office or employment while serving as a member of the council. A public member shall not receive a salary for service on the council but shall be reimbursed for reasonable and necessary expenses associated with serving on the council and may receive such per diem payment as may be provided in the annual appropriations act. A member may be removed by the Governor for cause. Vacancies among the public members shall be filled in the same manner in which the original appointment was made. The members of the council shall choose one of the public members to serve as the council's chair. The council may employ an executive director and such professional and clerical staff as it deems necessary and may call upon the Department of Community Affairs for such assistance as it deems necessary and may be available to it.

b. The Government Records Council shall:

establish an informal mediation program to facilitate the resolution of disputes regarding access to government records;

receive, hear, review and adjudicate a complaint filed by any person concerning a denial of access to a government record by a records custodian;

issue advisory opinions, on its own initiative, as to whether a particular type of record is a government record which is accessible to the public;

prepare guidelines and an informational pamphlet for use by records custodians in complying with the law governing access to public records;

prepare an informational pamphlet explaining the public's right of access to government records and the methods for resolving disputes regarding access, which records custodians shall make available to persons requesting access to a government record;

prepare lists for use by records custodians of the types of records in the possession of public agencies which are government records;

make training opportunities available for records custodians and other public officers and employees which explain the law governing access to public records; and

operate an informational website and a toll-free helpline staffed by knowledgeable employees of the council during regular business hours which shall enable any person, including records custodians, to call for information regarding the law governing access to public records and allow any person to request mediation or to file a complaint with the counsel when access has been denied;

In implementing the provisions of subsections d. and e. of this section, the council shall: act, to the maximum extent possible, at the convenience of the parties; utilize teleconferencing, faxing of documents, e-mail and similar forms of modern communication; and when in-person meetings are necessary, send representatives to meet with the parties at a location convenient to the parties.

c. At the request of the council, a public agency shall produce documents and ensure the attendance of witnesses with respect to the council's investigation of any complaint or the holding of any hearing.

d. Upon receipt of a written complaint signed by any person alleging that a custodian of a government record has improperly denied that person access to a government record, the council shall offer the parties the opportunity to resolve the dispute through mediation. Mediation shall enable a person who has been denied access to a government record and the custodian who denied or failed to provide access thereto to attempt to mediate the dispute through a process whereby a neutral mediator, who shall be trained in mediation selected by the council, acts to encourage and facilitate the resolution of the dispute. Mediation shall be an informal, nonadversarial process having the objective of helping the parties reach a mutually acceptable,

voluntary agreement. The mediator shall assist the parties in identifying issues, foster joint problem solving, and explore settlement alternatives.

e. If any party declines mediation or if mediation fails to resolve the matter to the satisfaction of all parties, the council shall initiate an investigation concerning the facts and circumstances set forth in the complaint. The council shall make a determination as to whether the complaint is within its jurisdiction or frivolous or without any reasonable factual basis. If the council shall conclude that the complaint is outside its jurisdiction, frivolous or without factual basis, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. Otherwise, the council shall notify the records custodian against whom the complaint was filed of the nature of the complaint and the facts and circumstances set forth therein. The custodian shall have the opportunity to present the board with any statement or information concerning the complaint which the custodian wishes. If the council is able to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, it shall reduce that conclusion to writing and transmit a copy thereof to the complainant and to the records custodian against whom the complaint was filed. If the council is unable to make a determination as to a record's accessibility based upon the complaint and the custodian's response thereto, the council shall conduct a hearing on the matter in conformity with the rules and regulations provided for hearings by a state agency in contested cases under the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), in so far as they may be applicable and practicable. The council shall, by a majority vote of its members, render a decision as to whether the record which is the subject of the complaint is a government record which must be made a available for public access pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented. If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in section 12 of P.L. , c. (C.) (now pending before the Legislature as this bill). A decision of the council may be appealed to the Appellate Division of Superior Court. A decision of the council shall not have value as a precedent for any case initiated in Superior Court pursuant to section 7 of P.L. , c. (C.) (now pending before the Legislature as this bill). All proceedings of the council pursuant to this subsection shall be conducted as expeditiously as possible.

f. The council shall not charge any party a fee in regard to actions filed with the council. The council shall be subject to the provisions

of the "Open Public Meetings Act," P.L.1975, c.231 (C.10:4-6), except that the council may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

g. The council shall not have jurisdiction over the Judicial or Legislative Branches of State Government or any agency, officer, or employee of those branches.[4]

[4][8.] 9.[4] (New Section) Nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.) [4],[4] as amended and supplemented [4],[4] shall be construed as limiting [4]the[4] common law [4]right of[4] access to [4]a[4] government [4][records] record, including criminal investigatory records of a law enforcement agency[4].

[4][[3]9.] 10.[4] (New Section) a. The provisions of this act, P.L. , c. (C.) (now pending before the Legislature as this bill), shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to P.L.1963, c.73 (C.47:1A-1 et seq.); any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.

b. The provisions of this act, P.L. , c. (C.) (now pending before the Legislature as this bill), shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.[3]

[4][[3]10.] 11.[4] (New section) Notwithstanding the provisions of P.L.1963, c.73 (C.47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency [4], including but not limited to records relating to any grievance filed by or against an individual,[4] shall not be considered a government record and shall not be made available for public access, except that:

an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;

personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by

an individual in interest; and

data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.[3]

. [3][9.] [4][11.[3]] 12.[4] (New Section) a. A public official, officer, employee or custodian who knowingly and willfully violates P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, [3]and is found to have unreasonably denied access under the totality of the circumstances.[3] shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation. This penalty shall be collected and enforced in [4][summary][4] proceedings in accordance with [4]["the penalty enforcement law," N.J.S.2A:58-1 et seq.] the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.)[4], and the rules of court governing actions for the collection of civil penalties. The Superior Court [4][and the municipal courts][4] shall have jurisdiction of proceedings for the collection and enforcement of the penalty imposed by this section. [4][An action shall be brought in the name of the State upon the complaint of the Attorney General, the municipal prosecutor of the municipality in which the violation occurred or the county prosecutor of the county in which the violation occurred.

The court also may recommend to an appropriate entity that appropriate]

Appropriate[4] disciplinary proceedings [4]may[4] be initiated against a public official, officer, employee or custodian against whom a penalty has been imposed.

[4]13. (New section) The New Jersey Supreme Court may adopt such court rules as it deems necessary to effectuate the purposes of this act.[4]

[4]14. (New section) The Commissioner of Community Affairs shall include in the annual budget request of the Department of Community Affairs a request for sufficient funds to effectuate the purposes of section 8 of P.L. , c. (C.) (now pending before the Legislature as this bill).[4]

[4]15. (New section) a. There is established a temporary Privacy Study Commission which shall consist of 13 members. The President of the Senate, the Minority Leader of the Senate, the Speaker of the General Assembly and the Minority Leader of the General Assembly

shall each appoint one public member. The Governor shall appoint nine members and shall designate one of the commission's members to serve as chair of the commission. In making appointments to the commission, legislative leaders and the Governor shall cooperate and coordinate to ensure that the representatives of the following groups and organizations are represented among the commission's membership and that the membership represents a balance between groups which advocate citizen privacy interests and groups which advocate increased access to government records: State and local law enforcement agencies, State and local government officers and employees, attorneys practicing in the field of individual privacy rights, public interest groups with a record of activity with respect to openness in government, crime victim advocates, members of the news media, and at least one retired member of the State Judiciary. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

b. The commission shall organize within 14 days after the appointment of a majority of its members.

c. The commission shall meet at the call of the chair and hold hearings at such places as the chair shall designate during the sessions and recesses of the Legislature. The commission shall comply with the provisions of the "Open Public Meetings Act, P.L.1975, c.231 (C.10:4-6 et seq.).

d. The commission shall be entitled to call to its assistance and avail itself of the services of the employees of any State, county, or municipal department, board, bureau, commission or agency, as it may require and as may be available for its purposes, and to employ stenographic and clerical assistance and incur traveling and other miscellaneous expenses as may be necessary in order to perform its duties, within the limits of funds appropriated or otherwise made available to it for its purposes.

e. The commission shall study the privacy issues raised by the collection, processing, use and dissemination of information by public agencies, in light of the recognized need for openness in government and recommend specific measures, including legislation, the commission may deem appropriate to deal with these issues and safeguard the privacy rights of individuals. In the course of its study, the commission shall review the current and proposed means used for the collection, processing, use and dissemination of information by State and local government agencies.

f. The commission shall report its findings and recommendations to the Governor and the Legislature within 18 months of the effective date of P.L. , c. (C.) (now pending before the Legislature as this bill) and may accompany the same with any legislative bills which it may desire to recommend for adoption by the Legislature.[4]

[4]16. There is appropriated $95,000 from the General Fund to the Privacy Study Commission established pursuant to section 15 of P.L. , c. (C.) (now pending before the Legislature as this bill).[4]

[1][10.] [4][12.[1]] 17.[4] Section 2 of P.L.1963, c.73 (C.47:1A-2), section 8 of P.L.1994, c.140 (C.47:1A-2.1) and section 4 of P.L.1963, c.73 (C.47:1A-4) are repealed.

[1][11.] [4][13[1]] 18.[4] [4][This] Sections 15 and 16 of this[4] act shall take effect [4]immediately and expire upon the date that the Privacy Study Commision submits its report to the Governor and the Legislature and the remainder of the act shall take effect[4] on the [4][first day of the third month following] 180th day after[4] enactment [4], except that public agencies may take such anticipatory administrative action in advance as shall be necessary for the implementation of the act[4].

Public Hearing

before

SENATE JUDICIARY COMMITTEE

SENATE BILL Nos. 161, 351, 573, and 866

(Issues dealing with public access to government records)

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: March 9, 2000
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT

Senator William L. Gormley, Chairman
Senator Louis F. Kosco
Senator Robert J. Martin
Senator John J. Matheussen
Senator Norman M. Robertson
Senator John A. Girgenti

ALSO PRESENT

John J. Tumulty
Office of Legislative Services
Committee Aide

Todd Dinsmore
Senate Democratic
Committee Aide

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey

William J. Kearns and Jon Moran, New Jersey League of Municipalities.

JON R. MORAN: Thank you, Mr. Chairman and members of the Committee.

My name is Jon Moran. I'm with the League of Municipalities.

I want to thank you and commend you for holding this hearing, as well, Mr. Chairman. Although we may not agree with what the other speakers have to say, or at least with everything they have to say, this is an important issue, and needs to be -- move forward.

I also want to take the opportunity to thank Senator Martin for his courtesy not only on this issue, but especially on this issue now. Senator Martin has always been willing to meet with us and to arrange meetings with other folks that are involved with the bill, and we appreciate that.

SENATOR MARTIN: At one time, I thought we had met all of your concerns and put it in there, but I guess our Prego needs a little more seasoning.

I'm sure we'll hear some.

MR. MORAN: It's just a bit more, but it's a good effort.

With me is Bill Kearns. Bill is a general counsel for the League of Municipalities. He's a former mayor, a former governing body member. He's been the municipal attorney at Willingboro, in Burlington County, for some years, and Bill is currently the President of the International Municipal Lawyers Association.

I'd just like to turn it over to Bill.

WILLIAM J. KEARNS JR., ESQ.: Thank you.

Let me just start off with saying, I think that we're probably far more in agreement than we have disagreement. You have four bills that are up for discussion today, and I think that it is constructive to have all of them being looked at, at the same time.

While we have certainly developed a body of law that addresses what are public and what are not public records, there has been confusion at various public offices as to what needs to be made available, what does not need to be made available. The League has tried to address that with a number of seminars on the issues. Certainly, when there were reports in the press last year that people came in and wanted to get a copy of the budget and were told they couldn't have it, that's a shock to all of us that deal with this all the time.

When people came into the school board office and wanted to get a copy of the superintendent's contract and were told that was confidential and couldn't be made available, that's mind boggling because I don't think there is any question that, under existing law, virtually everything that was being asked for under the Gannett series of articles was clearly a public record and should have been made available.

That's an educational process, but it is also a process that can benefit from a clarification in the law to make it even clearer as to what should be a public record, and I think that each of the bills tries to move in that direction. And while we have focused to a great extent on the language in Senator Martin's bill, which is identical of Assemblyman Geist's bill -- well, not identical, because they amended it in the Assembly and had made some amendments to it, which we would expect you would look at here.

I have to say that I think that the approach taken in Senator Robertson's bill is a better approach to the legislation. His bill identifies areas that are clearly to be considered public records, yet identifies certain things that are clearly not in the field of public records. It preserves some of the ability to deal with the gray areas.

Let me just talk about some of the very serious concerns that we have, and they deal with issues of privacy, and with all due respect to all the discussions that have gone on -- I don't not think have been adequately addressed.

There is a privacy-- And everyone seems to agree that yes, personnel files, and the information in them, should not be considered public records. The approach taken in Senator Martin's bill says that's already been addressed by executive orders and existing law. My concern is, however, that when you change the law, you change the foundation on which those executive orders were issued. And the executive order, I believe, was issued under Governor Byrne that said that personnel files are, in fact, confidential. That was issued when you had the existing law.

Now you change the law, and you say everything is public. There needs to be then, I believe, a new executive order that would exempt that. We have no indication from the administration that that has been thought about, that that has been looked at, that there will be a new executive order to address that. It seems to me that that needs to be addressed. And simply saying in the bill that items identified by executive order will be exempt -- I think it takes a new executive order, because when you change the law under which the old executive order was adopted, you change the basis for that executive order.

When we look at cases such as the North Jersey Newspaper Case, where they looked for the telephone records, that law -- that court decision was under the basis of the existing law. And they said there -- was that it was not a public record because it was not something mandated to be kept. And they said that on the balancing test it did not become a public record, and they recognized the privacy.

You change the law defining what is a mandated public record, you've changed the foundation for every one of those cases that have been decided under that. So while I think we agree, probably in principle, on the things that ought to be private and on the things that ought to be included and things that ought to be open, I think that the drafting of the legislation needs to be done carefully. And I think there needs to be an ability to take a look at the cases that have come down, decided on under the existing law, and if we want to embody that, then let's do that.

Whether we do that through this -- through the legislation, which I think is the better approach, and that is the style of the approach that Senator Robertson has taken in his bill, or whether we get some discussions with the administration, probably with the Attorney General's Office, and say, "Look, let's address these. Let's have this bill take effect simultaneously with the issuance of a new executive order that addresses those issues"-- Those are things that, I think, this Committee really needs to look at and to address.

We are not opposed to making information available to the public. That is not the issue. The issue is respecting the reasonable privacy rights not only of our own employees, but also of citizens who deal with this.

Senator Robertson mentioned and stole my line about the alarm systems because I think that's a very good one. We wind up with permit applications. They would be public records under this bill. There is nothing that would exclude those from someone being able to come and say, "Give me an electronic copy of your database of every permit that has been issued for an alarm system." Now maybe, maybe, the person who wants that simply wants to be able to go out and solicit those who don't have alarms and get business for it. But I can think of other people who might like to have that information. And under the bill, we have no right to ask who is asking for the information or why the want it.

I don't have a problem with that. I have no problem with that privacy of the individual asking for the information, but I think we have to really define and be careful to understand what it is that we're opening the doors to, and we have to respect the rights of our citizens. You cannot pick up a magazine or a newspaper today and not recognize that there is a great concern of the public with privacy. You've seen the major furor developed on Internet access and the double click and cookies being implanted on that so that people can track where you are on the Internet and what it is. People are concerned about their privacy. Just as we are concerned about making information available to the public so they can clearly evaluate whether their government is functioning well, we also have to be considerate of the privacy rights of individuals.

Now, yes, absolutely, there has to be a simpler way to address the issues. It should not require everyone who is aggrieved to go into a Superior Court lawsuit. And I personally don't think that municipal courts are the best

place for it. I think there could be some other mechanism. I tend to like-- I hate to keep saying I like Senator Robertson's bill, but Senator Robertson's bill that puts that in the Bureau of Archives is, quite frankly, the same way that they're doing it in Massachusetts. That is how they're doing it. And they issue directives, including to local officials, with regard to what is a public record and what is not. It's an effective mechanism.

And I think that is a better way of having that focused on people who deal with those records all the time than having it put into a municipal court operation. I just don't think the municipal court is the best place to deal with that.

Thank you.

SENATOR GORMLEY: Yes.

MR. MORAN: Bill's comments focused on the privacy concerns. He got into some of the technical concerns at the end. I just want to let the Committee know that the Municipal Clerks' Association is going to present testimony on those technical concerns and some of the amendments we're looking for.

I'd just like to associate myself with the Association in advance of those comments.

Thank you, Mr. Chairman.

SENATOR GORMLEY: We're going to take some questions now. We have about 20 witnesses. I'd just advise the Committee.

SENATOR ROBERTSON: I have a question.

SENATOR GORMLEY: They're going to agree with you, Norm. (laughter)

I have Senator Girgenti, Senator Matheussen, then Senator Martin, and then Norm, in order, as how the hands were raised.

SENATOR GIRGENTI: I just have really one question based on what you just said in terms of the time frame. If this bill would be enacted -- the Martin bill -- would you need two -- it has like a 60-day period that this has to go into effect with the executive orders and these other resolutions that are considered. I think the time frame, at least, should be expanded. Would you agree with that?

MR. KEARNS: I would tend to agree, Senator, but I think that I'm not, probably, the one to answer that. I think that answer probably ought to be directed, I would think, to the Attorney General's Office -- say, "How fast could you come up with the appropriate executive orders to do that?"

Sixty days is a tight time frame, but I would not want to presume to give some time frame that would work because that's not something we have control on.

SENATOR GIRGENTI: Okay.

SENATOR GORMLEY: Senator Matheussen.

SENATOR MATHEUSSEN: I have several concerns, but let me just boil it down to one question. Why are you so concerned with the municipal court handling this matter? It seems to me that that's, from a consumer's standpoint, a resident living in a town, that's probably the easiest place for them to access it and the easiest place for them to file their grievance. What's your objection?

MR. KEARNS: My objection is that the municipal court deals primarily with traffic violations, deals with drunk driving, deals with ordinance

violations. They have heavy court calendars right now. The person who would be prosecuting this is the municipal prosecutor. Remember that both the judge and the municipal prosecutor, even if it's sent to another municipal court, are appointed at the municipal level. And if you're having that kind of concern, I think that there will be a more objective approach to it if it's coming from a State agency, or if there were one-- Have a small-claims thing where you can file it in Superior Court for $15 and have a master appointed there to hear it. I mean, you don't have to have something that involves the very high fees for filing normal Superior Court matters. I just don't think that the municipal courts are the places to deal with that particular kind of issue.

SENATOR MATHEUSSEN: I respectfully disagree, but that's fine. Okay.

MR. MORAN: Senator, if I may on that, too. We're not necessarily against a procedure which would allow for the initial filing to be right at the municipality and the municipal court. Our problem is with then hearing the complaint in a municipal court.

So I think you could devise a procedure where the citizen could go down the hall to the municipal court, file his or her complaint, and then have another venue for the hearing of that complaint.

SENATOR GORMLEY: Senator Martin.

SENATOR MARTIN: Two quick questions.

On that very issue, then. If I understand you, you would prefer that there was filing that could be done in municipal court that was referred and handled by a special civil part, which -- at the county level, if there was a reduced or waived filing fee-- You're not interested in what the amount is.

MR. KEARNS: Have no problem if it's no fee. That's not a concern, as far as we're concerned.

SENATOR MARTIN: If the county prosecutor appointed, or had to assign, an assistant prosecutor to, at least, represent the person in that court, you would think that was a preferable procedure?

MR. KEARNS: I have no problem with that.

And, Senator, what I look at is-- We have, at the Superior Court level, a number of masters that get appointed by the court. We have them in the matrimonial field. We have them in other fields. And they sit, and they hear matters. And they hear them expeditiously. I think that's a better procedure than having it done in any municipal court. We have no disagreement with having a simple, easy procedure. I just don't think the municipal court's the place for it.

SENATOR MARTIN: The other question-- You raised the issue that somehow, maybe executive orders would all be in jeopardy, unless they were reinstated. You recognize in the first section that-- If I understand your interpretation, it almost sounds like everything else that's mentioned there, such as statutes and legislative resolutions -- I mean, they're all treated as if the existing ones would stay in place, but somehow executive orders would require reauthorization.

MR. KEARNS: No.

SENATOR MARTIN: I don't follow that, from a procedural point of view. In other words, we contemplated this as all of those protections that are provided in statutes, in legislative resolutions, and executive orders would

remain in place. But somehow, you're saying that this would separate out executive orders and require reauthorizations?

Let me just reduce it to this. You would acknowledge that there could be a different interpretation of that? And if we had to change this to clarify that existing executive orders remained in place, would that--

MR. KEARNS: And that may address it. That may well address it, Senator. My concern is that the basic principle of legal interpretation is that the most recent enactment of the Legislature is controlling. And obviously, we can all have good faith disagreements on how something would be interpreted on that. You get two lawyers in the room, you're going to get three opinions. We have enough lawyers here that we can certainly disagree on how a court might ultimately address something.

I do not think that it is sufficiently clear that we would not have a potential problem with the interpretation, since whatever you enact becomes the most recent.

SENATOR MARTIN: If it were clear that the existing executive orders would remain in place, that would satisfy you?

MR. KEARNS: That would certainly address the issue of the personnel files.

SENATOR MARTIN: Thank you.

SENATOR GORMLEY: Senator Robertson.

SENATOR ROBERTSON: I have a question for you, as an attorney, because I want to get back to the distinction that's important that you mentioned in your testimony.

SUPREME COURT OF NEW JERSEY
Docket No. 084956

LIBERTARIANS FOR TRANSPARENT GOVERNMENT, A NJ NONPROFIT CORPORATION, Plaintiff-Petitioner, v. CUMBERLAND COUNTY and BLAKE HETHERINGTON in her official capacity as Custodian of Records for Cumberland County, Defendants-Respondents.	CIVIL ACTION ON PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DOCKET NO. A-001661-18 Sat Below: Clarkson S. Fisher, P.J.A.D Allison E. Accurso, J.A.D. Robert J. Gilson, J.A.D.

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Alexander Shalom (021162004)
Julia T. Bradley*
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
570 Broad Street, P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
ashalom@aclu-nj.org

Counsel for Proposed *Amicus Curiae*

** Practicing law in New Jersey pursuant to R. 1:21-3(c).*

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INTEREST OF *AMICUS CURIAE*

The ACLU-NJ's mission sits squarely at the intersection of the issues raised in this case: it works to uphold the rights of incarcerated people, it champions the value of open government, and it advocates to protect privacy rights. Indeed, the ACLU-NJ has appeared before courts in this state advocating all three positions.

For example, *Amicus* has advocated for the fair treatment of incarcerated people in *Mejia v. New Jersey Dep't of Corr.*, 446 N.J. Super. 369 (App. Div. 2016) (addressing extreme disciplinary sanctions for prisoners with mental illnesses) and *Colon v. Passaic Cnty*., 2012 WL 1457764 (D.N.J. Apr. 24, 2012) (challenging the overcrowded and unsanitary living conditions at the Passaic County Jail).

ACLU-NJ has served as *Amicus Curiae* before New Jersey appellate courts in numerous Open Public Records Act cases involving law enforcement records. *See*, *e.g.*, *Paff v. Ocean Cnty. Prosecutor's Office*, 235 N.J. 1 (2018) (dash camera video of police use of force incident); *North Jersey Media Grp. Inc. v. Twp. of Lyndhurst*, 229 N.J. 340 (2017) (dash camera video of deadly police-involved shooting); *Kovalcik v. Somerset Cnty. Prosecutor's Off.*, 206 N.J. 581 (2011) (balancing transparency interest in law enforcement training records with privacy rights); *Wronko v. N.J. Society for the Prev. of Cruelty to Animals*, 453 N.J. Super. 73 (App. Div. 2018) (whether animal cruelty enforcement organization was subject to OPRA).

And, of course, the ACLU-NJ has appeared in numerous cases addressing the privacy rights of New Jerseyans. *See, e.g.*, *State v. Earls*, 214 N.J. 564 (2013) (recognizing expectation of privacy in cell phone location information); *Burnett v. Cnty. of Bergen*, 198 N.J. 408 (2009) (finding privacy interest in Social Security Numbers); *State v. Reid*, 194 N.J. 386 (2008) (finding expectation of privacy in Internet Service Provider records); *Doe v. Poritz*, 142 N.J. 1 (1995) (addressing privacy impact of Megan's Law).

As discussed below, these three issues are all implicated in this case. *Amicus* contends that they can be harmonized in a way that brings transparency and accountability to correctional facilities, thereby providing increased protection to incarcerated people who suffer abuse, without compromising important privacy interests.

PRELIMINARY STATEMENT

Amicus offers this brief to highlight the important public interest in transparency and accountability inside correctional facilities and to explain how public access to separation agreements like the one at issue in this case furthers this interest.

Days before this Court granted certification in this case, reports surfaced alleging that corrections officers brutally attacked and sexually assaulted several women during a forced extraction from cells inside the Edna Mahan Correctional

Facility. So far, eight corrections officers have been charged in the ongoing investigation. These reports were only the latest in New Jersey's long legacy of prison abuse, which includes documented patterns of constitutional violations following two Department of Justice civil rights investigations – including an investigation of Respondent Cumberland County Jail – within the past year. (Point I, A).

The reality inside New Jersey's prisons is likely even bleaker than the reports suggest. People who are incarcerated are often deterred from reporting abuse at the hands of correctional officers out of fear of retaliation or punitive institutional procedures. When abuse is reported, corrections facilities do not promptly investigate allegations, if they do at all. Because of the closed and hidden nature of prisons and the vulnerability of the people inside them, open records laws allow the public rare glimpses into prison operations and decision-making. (Point I, B).

What happens next at Edna Mahan and the Cumberland County Jail is of profound interest to the public. As prisoner advocates and state legislators have recently demonstrated, New Jerseyans want to know how prisons in their state address abuse and whether they are holding their staff accountable. But the success of those efforts, while laudable, also depends on the Open Public Records Act's promise of transparency if they are to be effective. (Point I, C).

The information contained in settlement agreements between a correctional facility and its employee following a disciplinary investigation – *especially* when disciplinary charges are dismissed, as they were in this case – lets the public know whether prison officials have made good on their promises to curb violence and misconduct inside prisons and jails. But by permitting correctional facilities to fully withhold settlement agreements resolving an employee's disciplinary investigation, the Appellate Division's decision denies the public an opportunity to understand how officials are addressing abuse, weakening one of the few mechanisms for transparency that exists for correctional facilities. (Point II, A).

Amicus recognizes the privacy interests animating OPRA's personnel records exemption, but the release of redacted records containing information that agencies and employees already expect to be public under the first exception to N.J.S.A. 47:1A-10 does not compromise those interests. As the trial court in this case recognized, the release of a separation agreement in redacted form strikes the appropriate balance between protecting truly sensitive "personnel" information, on the one hand, and permitting the public to see for themselves an agency's actual, not post-hoc, decision-making surrounding its employee's departure following a disciplinary investigation, on the other. Instead of grappling with the transparency interests at stake in this case, however, the Appellate Division analogized the personnel records exemption to N.J.S.A. 47:1A-1's exclusion of information related

to "sexual harassment complaints filed with a public employer," and drew a sharp distinction between any records relating to internal complaints or agreements, which it held are not subject to disclosure under OPRA, and complaints filed in a public forum, which are. In so doing, the Appellate Division's analysis neglected to consider the important public interest of accountability in prisons, which warrants *more* transparency in government decision-making following an employee's disciplinary investigation. (Point II, B).

As Respondent Cumberland County Jail demonstrated when it stated that its former employee was "terminated" when, in fact, that officer had been permitted to retire in good standing, prison officials are incentivized to gloss over decisions that they believe may reflect poorly on them when communicating those decisions to the public. Permitting an agency to summarize information to which the public is entitled not only thwarts OPRA's purpose of eradicating corruption, but places the burden on the requestor to verify the government agency's account, prolonging wait times for access to public records. (Point II, C).

Transparency as to how corrections officials do or do not hold their staff accountable for inhumane treatment of individuals under their care – in part through settlement agreements – is part and parcel of New Jersey's ongoing project to eradicate abuse in its prisons. Because this crucial public policy interest can be

vindicated at no cost to New Jerseyans' privacy, *Amicus* urges this Court to reverse the decision below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts the statement of facts and procedural history found in Petitioner's Brief and Appendix in the Appellate Division in this matter.

ARGUMENT

I. ABUSE IN NEW JERSEY'S PRISONS IS RAMPANT AND UNDERREPORTED.

A. A culture of abuse persists in New Jersey's prisons and jails.

According to press accounts, on January 11, 2021 over two dozen corrections officials, dressed in full body armor, entered jail cells to initiate forced "cell extractions" of several women housed at the Edna Mahan Correctional Facility. Those women were kicked, punched, groped, stomped on, maced, and spit on while handcuffed. Joe Atmonavage & Blake Nelson, *I was beaten, stomped and sexually assaulted. Inmate alleges brutal attack at N.J. women's prison*, NJ.com (Jan. 27, 2021).[1] According to one of the women, officers dragged her out of the cell by her hair and sexually assaulted her. *Id.* Two other women, including one transgender woman, were beaten so badly they needed to use wheelchairs. *Id.* One woman was left with a broken eye socket; another with a broken arm left "dangling" while she

[1] https://www.nj.com/news/2021/01/i-was-beaten-stomped-and-sexually-assaulted-inmate-alleges-brutal-assault-at-nj-womens-prison.html.

waited for medical attention for three days. *Id.* No corrections officers involved reported the unauthorized use of force, and prison officials did not return phone calls from the injured women's family members seeking information. *Id.* At least one officer has been charged with tampering with public records in an attempt to cover up the assault. Joe Atmonavage, *Prison guard was focus of complaints before alleged attack at women's prison, lawmaker says*, NJ.com (Feb. 9, 2021).[2]

The brutal attack is the latest episode in a persistent pattern of sexual, emotional, and physical abuse at Edna Mahan that is still coming to light. In April 2020, the Department of Justice released a report on conditions at Edna Mahan describing a decades-long "pervasive [culture of acceptance of sexual abuse that] has enabled Edna Mahan staff to abuse their authority by preying on vulnerable women . . . for sexual gratification." U.S. Dep't of Justice, Civil Rights Division & U.S. Att'y's Office, Dist. of N.J., *Investigation of the Edna Mahan Correctional Facility for Women* (Apr. 2020) (internal quotations and citation omitted) at 5.[3] Formerly incarcerated women would later testify at a public hearing that corrections officers frequently "sexually assaulted inmates, groped prisoners and demanded sexual favors for access to essential items, including sanitary pads[.]" Kelly Heyboer & Susan K. Livio, *Forced to have sex in exchange for toilet paper: Ex-*

[2] https://www.nj.com/news/2021/02/prison-guard-was-focus-of-complaints-before-alleged-attack-at-womens-prison-lawmaker-says.html.
[3] https://www.justice.gov/opa/press-release/file/1268391/download.

inmates detail abuse by guards in N.J. women's prison, NJ.com (July 2, 2020).[4] [5] These conditions, the Department of Justice alleged, violate the Eighth Amendment of the U.S. Constitution and the Civil Rights of Institutionalized Persons Act. U.S. Dep't of Justice, *Investigation of the Edna Mahan Correctional Facility for Women*, at 1.

The Department of Justice released another report on January 14 of this year alleging that the Cumberland County Jail's ("CCJ") medical neglect of people in its custody experiencing opiate withdrawal violated the Constitution through a pattern or practice of deliberate indifference to those individuals' medical needs. U.S. Dep't of Justice, Civil Rights Division & U.S. Att'y's Office, Dist. of NJ., *Investigation of the Cumberland County Jail* (Jan. 14, 2021) at 1, 4, 22.[6] The report found that CCJ's protocols around opiate withdrawal, including its failure to provide Medication-Assisted Treatment ("MAT") to those individuals despite MAT's overwhelming support in the medical community "likely contributed to the death of several inmates

[4] https://www.nj.com/news/2020/07/trading-sex-for-toilet-paper-and-bubble-gum-inmates-detail-abuse-by-guards-in-njs-womens-prison.html.

[5] Other correctional facilities with deeply entrenched cultures of abuse, such as New York City's Rikers Island, suffer from the same conditions. According to a May 2020 federal monitor report, Rikers prison guards used force an average of almost 600 times per month in 2019 compared to 390 times per month in 2016, even though the Rikers population declined over those three years. Benjamin Weiser, *Violence at Rikers at an 'All-Time High' Despite City's Promise to Curb It*, NY Times (Aug. 6, 2020), https://www.nytimes.com/2020/08/06/nyregion/rikers-island-violence-guards.html.

[6] https://www.justice.gov/usao-nj/press-release/file/1354736/download.

who committed suicide." *Id.* at 9. The report further documented the reluctance of people incarcerated at CCJ to report suicidal tendencies for fear of being "treat[ed] . . . like an animal" and "torture[d]," choosing to keep "suicidal thoughts to themselves" rather than endure "the stark conditions of the jail's suicide watch status." *Id.* at 13. Even after six people committed suicide in the jail between 2014 and 2017 – most within mere days after arriving at the facility – Respondent CCJ continued to "expose[] prisoners to serious harm by implementing its suicide watch policies in a manner that deters inmates from reporting suicidal thoughts." *Id.* at 12.

Other facilities in which individuals are confined and subject to corrections officers' control are vulnerable to the same abuse. As yet another example, the assault of a man civilly confined at the Adult Diagnostic and Treatment Center in Avenel, a recent lawsuit alleges, left him nearly comatose before he ultimately died. Joe Atmonavage, *N.J. man brutally beaten by correctional officers, left in own feces, lawsuit alleges. He died days later*, NJ.com (Mar. 3, 2021).[7] This abuse will persist so long as the public consistently has too little information to hold public agencies accountable in the aftermath of incidents like these.

[7] https://www.nj.com/news/2021/03/nj-inmate-brutally-beaten-by-officers-left-in-own-feces-lawsuit-alleges-he-died-days-later.html.

B. Abuse is chronically underreported.

"Prisons are among the least transparent institutions in the United States, despite the fact that they are supported by taxpayers and return approximately 95% of their residents to our communities." Press Release, Vera Institute of Justice, 17 States Open Up Prisons and Jails to Local Communities, (Nov. 11, 2016).[8] "[T]he closed nature of the prison environment and the fact that prisons house powerless, unpopular people [] creates a significant risk of mistreatment of abuse." David Fathi, *The Challenge of Prison Oversight*, 47 Am. Crim. L. Rev. 1453, 1453 (2010). Indeed, according to the latest available data from the Bureau of Justice Statistics, there were 24,661 allegations of sexual victimization in adult correctional facilities in 2015. Ramona R. Rantala, U.S. Dep't of Justice Bureau of Justice Statistics, *Sexual Victimization Reported by Correctional Authorities, 2012-15* (July 2018) at 1.[9] And because of the dramatic racial disparities in incarceration and sentencing, abuse disproportionately affects people of color. Sentencing Project, *Detailed State Data: New Jersey.*[10] *See also* Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 Yale L. & Pol'y Rev. 1, 17 (2010) ("[B]lack and

[8] https://www.vera.org/newsroom/17-states-open-up-prisons-and-jails-local-communities-national-prison-visiting-week.
[9] https://www.bjs.gov/content/pub/pdf/svraca1215.pdf.
[10] https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=New%20Jersey (last visited April 3, 2021).

Latino prisoners were significantly more likely than white prisoners to report sexual victimization by prison staff," according to a statewide survey).

Without adequate oversight, prisons often have protocols in place that "discourage prisoners from reporting sexual abuse and allow sexual abuse to occur undetected and undeterred." U.S. Dep't of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 1. *See also* Buchanan, *Our Prisons, Ourselves* at 68 n.385 ("There is broad consensus among correctional authorities that sexual abuse is underreported."). As the April 2020 Department of Justice report found, Edna Mahan's policy of systematically placing people who reported abuse into solitary confinement and depriving them of programming and other privileges had this effect. U.S. Dep't of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 9. Grievance reports that did get filed, as one woman who was formerly incarcerated at Edna Mahan testified, might be "ripped up in front of your face." Heyboer & Livio, *Ex-inmates detail abuse by guards in N.J. women's prison*.

The Department of Justice's investigation of Edna Mahan also found that raising awareness of sexual abuse among corrections officers failed to provide accountability because officers may perpetuate the culture by maintaining a "code of silence":

> [D]espite being aware of both ongoing instances of sexual abuse and sexual harassment and the means to report,

> correction officers did not report sexual abuse or sexual harassment being committed by other custody staff, even anonymously. This implies either that correction officers do not trust Edna Mahan's investigative systems; that a "code of silence" exists where Edna Mahan officers are unwilling to speak out against other officers; or that some officers are involved in actively concealing misconduct. [U.S. Dep't of Justice, *Investigation of the Edna Mahan Correctional Facility for Women* at 26.]

The report continued by explaining that "[a]n important component to eradicating sexual abuse in correctional settings is staff participation in identifying abusive conditions and their responses to these conditions." *Id.*

In addition to discouraging initial reports of abuse, corrections officials can evade accountability by halting investigations after a victim is out of their custody. Investigations involving detained immigrants are particularly susceptible to interruption given the ability of Immigration and Customs Enforcement to deport an individual during an ongoing investigation. In one example, the Essex County Correctional Facility halted an investigation after the detained person who had alleged abuse by corrections officers was deported, despite the fact that the investigation was still pending at the time of deportation. Matt Katz, *ICE Deports Cabbie Despite Ongoing Investigation into His Alleged Abuse at Essex Jail,* WNYC News (Aug. 15, 2019).[11] Experience has also shown the lengths to which a facility

[11] https://www.wnyc.org/story/ice-deports-detainee-despite-ongoing-investigation-alleged-abuse-essex-county-jail/.

may go to avoid disclosing unflattering facts about its operations. The death of an individual who had been detained in California's Adelanto Immigration and Customs Enforcement processing center just three days after his release, for instance, "raise[d] questions about whether immigration officials are undercounting detainee deaths during the pandemic by releasing people just before they die." Alene Tchekmedyian & Andrea Castillo, *ICE released a sick detainee from Adelanto immigration facility. He died three days later*, L.A. Times (Mar. 20, 2021).[12]

Because abuse so often goes underreported, when it *is* reported, investigated, and leads to a disciplinary proceeding, what happens next takes on outsized importance to the public. As discussed below, now more than ever, New Jerseyans want to know how correctional facilities are responding in the aftermath of these incidents.

C. New Jerseyans want to know when prisons fail to hold their employees accountable for abuse.

"In order to truly reimagine our incarceration system, we must first break down the barriers between prisons and larger society." Vera Institute of Justice, *17 States Open Up Prisons and Jails to Local Communities – and National Leaders – to Foster Transparency as Part of National Prison Visiting Week* (quoting Vera Institute's Center on Sentencing and Corrections Director, Fred Patrick). Recent

[12] https://www.latimes.com/california/story/2021-03-20/adelanto-detainee-death.

efforts by New Jersey advocates and legislators reflect the public's interest in doing just that.

Bills enacted in the state legislature over the past year have sought increased transparency and accountability specifically for corrections officers who perpetuate abuse. *See* Valerie Vainieri Huttle, *Opinion: Legislator: Edna Mahan needs even more oversight*, NJ.com (Feb. 19, 2021)[13] (describing the introduction of a package of bills that would increase oversight of correctional facilities). Among these important new laws, one requires corrections officers to undergo specialized training in prevention of sexual misconduct and investigating allegations of sexual abuse, *see L.* 2019, *c.* 410, § 2; another establishes a reporting scheme through which correctional employees are required to report abuse of people incarcerated at the facility. *See L.* 2019, *c.* 408, § 3.

New Jersey also recently enacted the Dignity for Incarcerated Primary Caretaker Parents Act,[14] which, in addition to supporting relationships between incarcerated women and their families, promises to strengthen the independence of the Office of the Corrections Ombudsperson. *L.* 2019, *c.* 299; Press Release, Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act (Jan. 9, 2020). The Act requires the Office, among other things, to "conduct

[13] https://www.nj.com/opinion/2021/02/legislator-edna-mahan-needs-even-more-oversight-opinion.html.
[14] https://nj.gov/governor/news/news/562020 /approved/20200109b.shtml.

investigations of inmate complaints," *id.* § 8(a), and grants the Office the authority to make "both scheduled and unannounced inspections" of correctional facilities at any time, *id.* § 9(e), to "identify[] systemic issues and responses upon which the Governor and Legislature may act," *id.* § 26(c)(3), and to make a public report that includes "a description of significant systemic or individual investigations or outcomes achieved by the ombudsperson in the preceding year," *id.* § 28(b)(10)c.

Additionally, Senator Loretta Weinberg's Workgroup on Harassment, Sexual Assault and Misogyny in New Jersey Politics, which was created in late 2019 and includes a number of state officials, chose to broaden its scope from its focus on misogyny in state politics after the Department of Justice released its findings on sexual assault at Edna Mahan in May 2020. *Report of the Workgroup on Harassment, Sexual Assault and Misogyny in New Jersey Politics* (Jan. 14, 2021) at 35.[15] As a part of this broadened scope, the workgroup focused its fourth public hearing on testimony from women formerly incarcerated at Edna Mahan. *Id.*

As these new laws and initiatives demonstrate, New Jersey's public is intensely focused on eradicating abuse in its prisons. Though these efforts are commendable, on their own they are insufficient to achieve accountability; they complement the need for the transparency that OPRA provides, not replace it.

[15] https://d1ung6i9j8i9xc.cloudfront.net/wp-content/blogs.dir/123/files/2021/01/Workgroup-Report-Final.pdf.

II. ACCESS TO SETTLEMENT AGREEMENTS BETWEEN A GOVERNMENT AGENCY AND ITS EMPLOYEES BENEFITS THE PUBLIC.

OPRA's "twin aims – of ready access to government records and protection of a citizen's personal information – require a careful balancing of the interests at stake." *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 414 (2009). OPRA "requires public agencies 'to safeguard from public access a citizen's personal information' when disclosure would violate a person's reasonable expectation of privacy.'" *Id.* (citing N.J.S.A. 47:1A-1). At the same time, the statute instructs that "limitations on the right of access . . . shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. For the reasons that follow, the Appellate Division's decision wholly abandoned OPRA's first aim by failing to recognize the important public policy behind public access to settlement agreements, while also overstating privacy concerns.

A. Public access to settlement agreements curbs abuse by creating accountability.

"With broad public access to information about how state and local governments operate, citizens and the media can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct." *Burnett*, 198 N.J. at 414. Notwithstanding the challenges that the public faces in accessing information inside prisons, transparency measures like open records laws and reporting requirements help bring instances of abuse to light. Indeed, the most

recent Bureau of Justice Statistics data report noted that the dramatic increase in allegations of abuse between in 2015 – nearly triple the allegations in 2011 – coincided with the Department of Justice's publication of the National Standards to Prevent, Detect, and Respond to Prison Rape in 2012, which require correctional facilities to track and report information on sexual victimization. Rantala, U.S. Dep't of Justice Bureau of Justice Statistics, *Sexual Victimization Reported by Correctional Authorities, 2012-15* at 1. OPRA therefore serves a vital role in prison transparency that is consistent with its "purpose . . . 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" *Mason v. City of Hoboken*, 196 N.J. 51, 65 (2008).

Transparency and accountability in the jail and prison context have tangible results: when institutions treat people in their custody fairly, those people perceive the institutions to be more legitimate, making them safer. Andrea C. Armstrong, *No Prisoner Left Behind?* 25 Stan. Law & Pol. Rev. 435, 465 (2014). Empirical studies in the policing and criminal justice fields "clearly demonstrate the relationship between enhanced institutional legitimacy and fair and neutral treatment by the institution." *Id.* Examples of such kinds of studies have also found a correlation between a reduction in violence inside prisons in which corrections officers did not use coercive tactics. *See, e.g.*, Benjamin Steiner & John Wooldredge, *Prison Officer*

Legitimacy, Their Exercise of Power, and Inmate Rule Breaking, 56 Criminology 750, 774 (2018) (describing prior studies finding that "prisons in which officers relied less on coercion and more often treated inmates with respect and fairness experienced less violence than did prisons in which officers used coercion more frequently" and that "prisons with staff who were fairer with inmates also were more orderly and had better inmate-staff relations").

The "ultimate 'discrete and insular minorit[y],'" incarcerated people compromise one of the most vulnerable populations. Fathi, *The Challenge of Prison Oversight*, (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). "[N]o other group in American society is so completely disabled from defending its rights and interests." *Id.* Because of this vulnerability, and because corrections officers control nearly every aspect of people's lives while they are confined, corrections officers hold an exorbitant amount of power inside a facility. Officers may decide if and how discipline is meted out, or whether an incarcerated person may require life-saving medical attention; they have the authority to regulate individuals' access to phones, mail, visitors, and the media. Many of these day-to-day decisions go unmonitored and unchecked. The dearth of oversight means that when a corrections officer is actually investigated for abusive behavior, their employer's response to that behavior offers the public a rare and important glimpse into the facility's decision-making. While *Amicus* recognizes that the reach of this

Court's decision implicates only the portion of such responses made through formal settlement agreements, information about a correctional facility's decision-making regarding allegedly abusive behavior is nonetheless a critical part of the transparency landscape that has developed in New Jersey.

Public access to the terms of a settlement agreement allows the public to attach accountability to a public prison following an abuse. In particular, a vital purpose is served when the public becomes aware of a public official's decision *not* to pursue discipline. When prosecutors decline to prosecute a case, for example, their announcement of that declination can promote accountability, both to the public and to other government institutions. *See* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. Crim. L. and Criminology, 477, 500-504 (2020). "Absent a declination statement, the public can eventually surmise that a prosecutor had declined to press charges with respect to a given matter, but that decision would be hard to pin down and might surface too late for there to be any meaningful accountability for it." *Id*. at 502. Likewise, a correctional facility's decision to allow an employee facing disciplinary charges for sexual abuse to retire rather than face discipline can indicate that it is not, in fact, committed to stopping that abuse.

The importance of attaching accountability to prison officials' decision not to take action in response to abuse allegations is evident in the Department of Corrections' apparent inaction upon receipt of a letter from a New Jersey legislator,

sent several months before the January 2021 assaults on the women, advising that one of the facility's corrections officers was a known abuser. The officer in question was still employed and was alleged to have participated in the assaults on the women in January. Atmonavage, *Prison guard was focus of complaints before alleged attack at women's prison, lawmaker says*. By then, the time had long passed for the public to hold Edna Mahan accountable for its decision not to pursue disciplinary action. The same principle is also manifest in the recently-enacted Dignity for Incarcerated Primary Caretaker Parents Act, *see supra* Part I.C. Recognizing the value of communicating agency decision-making around accountability, the Act contains provisions requiring various actors involved in prison oversight to articulate the actions they take, and the reasons behind those actions, to their stakeholders. *See L.* 2019, *c.* 288 § 8(b) (providing that "[i]f the ombudsperson does not investigate a complaint, the ombudsperson shall notify the complainant of the decision not to investigate and the reasons for the decision" and that "[a]t the ombudsperson's request, the [D]epartment [of Corrections] shall, within the time specified, inform the ombudsperson about any action taken on the recommendations or the reasons for not complying with the recommendations").

Public access to settlement agreements resolving disciplinary actions can also help prison officials remain accountable to other government branches that oversee correctional facilities. *See* Roth, *Prosecutorial Declination Statements* at 504-05 (in

the context of prosecutorial decisions, declination statements "provide a means for [other government] agencies to check that prosecutors are in fact doing the work that the agencies understand to be their collective project."). Likewise, given the Legislature's intense interest in eradicating abuse in prisons, public access to settlement agreements can complement statutory reporting requirements by alerting the Legislature when a correctional facility has fallen short of its mission.

B. The privacy interests that animate OPRA's personnel records exemption are not compromised here.

In its opinion, the Appellate Division reasoned that an internal settlement agreement resolving disciplinary charges constitutes a personnel record because it "*often* involves an employee accepting discipline," and that "*some* employees [would be expected to] agree to settle disciplinary charges, at least in part, to avoid public disclosure of the charges." *Libertarians for Transparent Gov't v. Cumberland Cnty.*, 465 N.J. Super. 11, 20-21 (2020) (emphasis added). OPRA's scheme does "recognize[] that there are limits" to liberal disclosure, "one of which relates to personnel records that are often sensitive, and understandably personal, in nature." *Kovalcik v. Somerset Cnty. Prosecutor's Off.*, 206 N.J. 581, 595 (2011) (citing N.J.S.A. 47:1A–1 (public agencies must "safeguard from public access a citizen's personal information . . . when disclosure thereof would violate the citizen's reasonable expectation of privacy")). But the release of settlement agreements

would neither compromise employee privacy, nor would it undermine the public policy rationales behind non-disclosure.

First, the Appellate Division's holding that settlement agreements should be fully withheld because of their relatedness to disciplinary proceedings was not tethered to a specific privacy concern implicated by disclosure. *See Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 162 (App. Div. 2011) (courts must not accept a custodian's "conclusory and generalized" statements of an exemption and "reasons for withholding documents must be specific"). As Petitioner pointed out, just because a settlement agreement may relate to or resolve a disciplinary investigation does not necessarily completely indicate the content of that settlement agreement. Plaintiff-Petitioner's Pet. for Certification (Oct. 9, 2020) at 15. Regardless, there is no reason why targeted redactions could not preserve "the privacy of truly personal information, including medical and psychological records and the contents of personnel files[.]" *Asbury Park Press v. Cnty. of Monmouth*, 406 N.J. Super. 1, 10 (App. Div. 2009), aff'd, 201 N.J. 5 (2010). The trial court below understood this and, accordingly, ordered the disclosure of the settlement agreement in redacted form.

Second, public policy favoring settlements is likewise not compromised by disclosing settlement agreements. As a threshold observation, this Court has already recognized, through its affirmance of the Appellate Division's ruling and reasoning

in *Asbury Park Press*, that even though "[d]efendants sometimes have an incentive to avoid exposure or embarrassment, and terms of confidentiality may promote settlement[,] . . . the policy favoring settlements is far outweighed by the importance of maintaining open government." *Id.* at 11. Notwithstanding the Appellate Division's emphasis in that case on the public nature of the settlement, the court took note, more generally, of "New Jersey's strong public policy favoring open government and the general public['s] . . . right to be fully informed on the actions of its elected officials." *Id.* (citing *Tarus v. Borough of Pine Hill*, 189 N.J. 497, 507 (2007)).

The Appellate Division in this case also erred by transposing onto the personnel records exemption its analysis of an entirely different statutory exception examined in *Asbury Park Press*. That case held that a confidential settlement agreement resolving litigation between an employee and her public employer, whom she alleged had subjected her to sexual harassment, did not fall within the plain text of OPRA's exclusion from disclosure any information related to "sexual harassment complaints filed with a public employer" because the employee had filed her complaint publicly in Superior Court, rather than internally with the public employer. *Id.* at 10. If an employee wishes to keep the complaint private, the *Asbury Park Press* court explained, "[t]he Legislature gave victims the opportunity to bring sexual harassment complaints to their public employers without public access." *Id.*

Seizing on this distinction, the Appellate Division in this case reasoned that, likewise, an agency's internal settlement agreement to resolve internal disciplinary charges was analogous to the internal sexual harassment complaints exclusion. The Appellate Division thus categorically differentiated, as a matter of public policy, "between internal records maintained by a governmental entity relating to employee personnel matters, be it disciplinary records, or sexual harassment complaints and investigations, and the public airing of such matters in a civil lawsuit." *Libertarians for Transparent Gov't v. Cumberland Cnty.*, 465 N.J. Super. at 22.

It is not at all clear that the Legislature intended such a distinction within the personnel records exemption. Settlement agreements between a public entity and its employee, where the victim of the alleged conduct is not a party to the agreement, involve the separate transparency and accountability considerations discussed *supra*, Part II.A. By focusing so narrowly on the private-public forum distinction, the panel below lost sight of these important interests.

C. The Appellate Division's decision adds an additional layer of secrecy by permitting an agency to summarize government record information, then placing a burden on requestors who wish to verify that information.

The Appellate Division recognized the potential problem of agency dishonesty in summarizing information to which the public is entitled under the first exception to N.J.S.A. 47:1A-10, agreeing with Petitioners "that OPRA was designed to prevent public agencies engaging in such inaccurate 'spin.'" *Libertarians for*

Transparent Gov't v. Cumberland Cnty., 465 N.J. Super. at 29. Rather than compel the disclosure of that information in the requested record, however, the Appellate Division reasoned that a "court has other measures, such as ordering the [agency] to correct the record following the court's *in camera* review of the withheld documents and awarding the requestor its fees, to address the discrepancy." *Id.*

The seemingly straightforward remedy of *in camera* review may be simple enough for a requestor who has already filed suit to obtain documents. For other requestors, the Appellate Division's decision effectively forces them to litigate or appeal any decision to withhold a record containing "an employee's name, date and reason for separation and pension information," which is not exempt under N.J.S.A. 47:1A-10, in order to verify that an agency's summary accurately represents the actual information in the record. Normally, if an agency withholds records to which an OPRA requestor believes they are entitled, the requestor's only remedies are to file an action in Superior Court, or to file a complaint with the Government Records Council. N.J.S.A. 47:1A–6; *Paff v. N.J. Dep't of Lab., Bd. of Rev.*, 379 N.J. Super. 346, 353 (App. Div. 2005). But because the upfront costs of a filing fee and attorney's fees foreclose the former option for many requestors, those individuals are left instead with only one choice: either to file a complaint with the GRC, which can take years, *see, e.g., Cielesz v. N.J. State SPCA*, 2017-218 FD (issuing final decision on February 25, 2021 for complaint received on November 9, 2017);

McFarland v. N.J. Institute of Technology, 2018-289 FD (issuing final decision on February 25, 2021 for complaint received on November 26, 2018); *Scutro v. City of Linden*, 2019-167 (issuing final decision on February 23, 2021 for complaint received on August 16, 2019); *Capone v. Kean University*, 2017-60 FD (issuing final decision on May 3, 2019 for complaint received on January 26, 2017) – greatly increasing the time a requestor can expect to spend waiting for access to a record – or else to simply accept the government's summary at face value. Both results undermine OPRA's purpose.

CONCLUSION

Because transparency in government, especially in correctional facilities, promotes needed accountability, and because redactions of disclosures sufficiently protect privacy interests without undermining OPRA's purpose, the Court should reverse the Appellate Division and order disclosure of the settlement agreement.

Respectfully submitted,

Alexander Shalom (021162004)
Julia T. Bradley*
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
570 Broad Street, 11th floor
P.O. Box 32159
Newark, NJ 07102
T: 973-854-1714
E: ashalom@aclu-nj.org

* *Practicing law in New Jersey pursuant to R. 1:21-3(c).*

Dated: April 5, 2021

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

Libertarians for Transparent Government v. Cumberland County
(A-34-20) (084956)

Argued September 14, 2021 -- Decided March 7, 2022

RABNER, C.J., writing for a unanimous Court.

In this appeal, plaintiff Libertarians for Transparent Government seeks a copy of a settlement agreement between a former corrections officer and his employer, defendant Cumberland County. The Court considers whether the agreement should be turned over under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13.

In October 2017, a woman incarcerated at the Cumberland County Jail filed a lawsuit against the County and several corrections officers, including Tyrone Ellis, alleging she had been forced to engage in non-consensual sex acts on a regular basis.

To learn more about the allegations, Libertarians obtained minutes of the public meeting of the Board of the Police and Firemen's Retirement System at which the Board considered Ellis's application for special retirement. According to the minutes, the County originally sought to terminate Ellis, who had been charged with a disciplinary infraction. When he submitted his resignation, the County warned that it intended to continue to prosecute the disciplinary matter. Ellis, in turn, "agreed to cooperate" with the County's investigation of four other officers suspected of similar misconduct. "As a result of his cooperation, Cumberland County agreed to dismiss the disciplinary charges and permit Mr. Ellis to retire in good standing" with a reduced pension.

Libertarians sent the County an OPRA request seeking, as relevant here, the settlement agreement and Ellis's "'name, title, position, salary, length of service, date of separation and the reason therefor' in accordance with N.J.S.A. 47:1A-10." The County declined to produce the settlement agreement, claiming it was a personnel record exempt from disclosure. In response to the request for information, the County stated in part that "Officer Ellis was charged with a disciplinary infraction and was terminated."

Libertarians filed a complaint in Superior Court, and the trial court ordered the County to provide a redacted version of the settlement agreement. The County appealed, and the Appellate Division reversed the trial court's judgment. 465 N.J. Super. 11, 13 (App. Div. 2020). The Court granted certification. 245 N.J. 38 (2021).

HELD: Most personnel records are confidential under OPRA. But under the law's plain language, certain items qualify as a government record including a person's name, title, "date of separation and the reason therefor." N.J.S.A. 47:1A-10. To the extent that information appears in a settlement agreement, the record should be available to the public after appropriate redactions are made.

1. Under OPRA, "all government records shall be subject to public access unless exempt." N.J.S.A. 47:1A-1. The statute calls for a careful balancing of the right of access to government records versus the need to protect personal information, and it permits targeted redactions of information that should not be disclosed. See id. at -5(g). Section 10 of OPRA addresses personnel records. Id. at -10. Most are exempt from disclosure under the law, but the statute has three exceptions. Ibid. (pp. 11-12)

2. This appeal turns on the first exception, under which "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record." Ibid. A plain reading of section 10 calls for disclosure of a settlement agreement that contains such information once the document has been redacted. (pp. 12-14)

3. In Kovalcik v. Somerset County Prosecutor's Office, the Court determined that, if information within requested personnel records did not fall under section 10's third exception, it should be redacted, but that the redacted records themselves should be disclosed. 206 N.J. 581, 585-86, 593-95 (2011). Here, part of the settlement agreement that Libertarians seeks contains information covered by section 10's first exception, and as in Kovalcik, the document is subject to disclosure after it is redacted. Details that are not listed in the exception but constitute personnel records would still be exempt from disclosure. Some requestors may be satisfied with a written summary of information, but OPRA entitles them to press for actual records in many situations. (pp. 14-17)

4. Under section 10, the reasons Ellis separated from government service qualify as a "government record." A settlement agreement that includes those details must therefore be made available to the public once it is redacted. OPRA enables the public to play a role in guarding against corruption and misconduct. Here, the County stated that Ellis was terminated. In reality, he was allowed to retire in good standing with only a partial pension forfeiture. Without access to actual documents in cases like this, the public can be left with incomplete or incorrect information. Libertarians is entitled to a redacted version of the actual settlement document, and the trial court's award of attorney's fees to Libertarians as the prevailing party under N.J.S.A. 47:1A-6 is reinstated. (pp. 17-19)

The judgment of the Appellate Division is REVERSED.

JUSTICES ALBIN, PATTERSON, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-34 September Term 2020

084956

Libertarians for Transparent Government,
a NJ Nonprofit Corporation,

Plaintiff-Appellant,

v.

Cumberland County and Blake Hetherington
in her official capacity as
Custodian of Records for Cumberland County,

Defendants-Respondents.

On certification to the Superior Court,
Appellate Division, whose opinion is reported at
465 N.J. Super. 11 (App. Div. 2020).

Argued	Decided
September 14, 2021	March 7, 2022

CJ Griffin argued the cause for appellant (Pashman Stein Walder Hayden, attorneys; CJ Griffin, of counsel and on the briefs).

Jeffrey P. Sarvas argued the cause for respondents (Barker, Gelfand, James & Sarvas, attorneys; Jeffrey P. Sarvas, and Vanessa E. James, on the briefs).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom, Jeanne LoCicero, and Julia

T. Bradley, of the New York bar, practicing pursuant to R. 1-21-3(c), on the brief).

Bruce S. Rosen submitted a brief on behalf of amici curiae Reporters Committee for Freedom of the Press; Advance Publications, Inc.; The Associated Press; The Atlantic Monthly Group LLC; The Center for Investigative Reporting; Gannett; The Media Institute; The National Freedom of Information Coalition; National Journal Group LLC; NBCUniversal Media LLC; The New Jersey Press Association; Radio Television Digital News Association; Society of Professional Journalists; and The Tully Center for Free Speech (McCusker, Anselmi, Rosen, & Carvelli, attorneys; Bruce S. Rosen, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

In this appeal, plaintiff Libertarians for Transparent Government seeks a copy of a settlement agreement between a former corrections officer and his employer, defendant Cumberland County.

In a separate lawsuit, an inmate at the Cumberland County Jail accused the corrections officer of forcing her to engage in non-consensual sex acts in prison. Libertarians learned that the officer had been accused in a disciplinary action of "improper fraternization" with two female inmates and bringing contraband into the jail. He admitted the misconduct and entered into a settlement agreement with the County.

Relying on the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, Libertarians asked the County for the actual settlement agreement. The County declined to turn it over on the ground that it was a personnel record. Instead, the County provided certain details in writing and stated, in particular, that the officer had been "charged with a disciplinary infraction and was terminated." That was not true. The officer was allowed to retire in good standing and collect a partly reduced pension.

Most personnel records are confidential under OPRA. But under the law's plain language, certain items qualify as a government record including a person's name, title, "date of separation and the reason therefor." Id. § 10. To the extent that information appears in a settlement agreement, the record should be available to the public after appropriate redactions are made.

In this case, the trial court properly ordered disclosure of a redacted settlement agreement, and the Appellate Division reversed. We reinstate the trial court's order.

I.

In October 2017, a woman incarcerated at the Cumberland County Jail filed a federal lawsuit against the County and several corrections officers, including Tyrone Ellis. Among other things, she alleged that Ellis and other officers forced her to engage in non-consensual sex acts on a regular basis.

To learn more about the allegations, Libertarians obtained minutes of the March 18, 2018 public meeting of the Board of the Police and Firemen's Retirement System. At the meeting, the Board considered Ellis's application for special retirement.

The minutes revealed that Ellis had been charged in a Preliminary Notice of Disciplinary Action (PNDA), dated August 23, 2016, "with conduct unbecoming . . . related to alleged improper fraternization with inmates and introduction of contraband into the facility." Ellis admitted he had "inappropriate relationships with two inmates" and brought contraband into the jail. He did not dispute that he had brought bras, underwear, cigarettes, and a cell phone into the prison.

According to the minutes, the County originally sought to terminate Ellis. When he submitted his resignation, the County warned that it intended to continue to prosecute the disciplinary matter. Ellis, in turn, "agreed to cooperate" with the County's investigation of four other officers suspected of similar misconduct. "As a result of his cooperation, Cumberland County agreed to dismiss the disciplinary charges and permit Mr. Ellis to retire in good standing." As part of a settlement agreement dated March 1, 2017, "all charges listed on the PNDA were withdrawn."

The minutes also noted that Ellis had served as a corrections officer for twenty-five years and six months. Because his "misconduct reflected multiple offenses over an extended period of time and was directly related to his duties as a County Correction Officer," the Board "reduced his service and salary to 20 years, the requisite service credit to qualify for a Service retirement." In other words, Ellis retired in good standing, and the Board allowed him to receive a reduced pension.

Libertarians sent the County an OPRA request on July 24, 2018. It asked for three things: the PNDA; the settlement agreement; and Ellis's "'name, title, position, salary, length of service, date of separation and the reason therefor' in accordance with N.J.S.A. 47:1A-10."

The County declined to produce the PNDA and the settlement agreement, claiming they were personnel records the law exempts from disclosure. As for the third item, the County stated in an email that

> Officer Ellis was charged with a disciplinary infraction and was terminated. His title was as a Corrections Officer. His yearly salary was $71,575. His date of hire was March 6, 1991. His date of separation was February 28, 2017. As indicated above, the reason for the separation was a disciplinary infraction.
>
> [(emphasis added).]

The County did not provide redacted versions of the PNDA or the settlement agreement.

Libertarians then filed a complaint in Superior Court. The complaint sought access to the settlement agreement under OPRA and the common law right of access but did not seek a copy of the PNDA. Libertarians asserted that the County "misrepresent[ed] the 'reason' for Ellis's separation from public employment" and withheld a government record that should have been disclosed. In the alternative, Libertarians asked the court to review the record in camera and release it in redacted form. The County maintained the settlement agreement was an exempt personnel record, and that "confidentiality" relating "to the continuing investigation of disciplinary infractions" was "also important."

The trial court ordered the County to provide a redacted version of the settlement agreement. The court found the agreement was "a government record subject to disclosure under OPRA," not a personnel record exempt from disclosure. After an in camera review of the document, the court heavily redacted it and removed parts that referred to Ellis's cooperation with the County Prosecutor and his disciplinary infractions. The court also noted that OPRA's exemption for records of ongoing investigations did not apply, see N.J.S.A. 47:1A-3(a), and that the County "violated OPRA by misrepresenting the reason for Ellis's separation" from employment.

Because the trial court granted access to the settlement agreement under OPRA, it did not address the common law right of access. The court awarded Libertarians attorney's fees as the prevailing party under N.J.S.A. 47:1A-6; the parties consented to the amount of the fees, subject to appeal.

The County appealed, and the Appellate Division reversed the trial court's judgment. Libertarians for Transparent Gov't v. Cumberland County, 465 N.J. Super. 11, 13 (App. Div. 2020). The court held that "a settlement agreement resolving an internal disciplinary action against a public employee is not classified as a government record under OPRA, but instead is a personnel record exempt from disclosure under section 10 of the statute."[1] Ibid. The court found such records differed from "[s]ettlement agreements by public agencies to resolve civil suits," which "are accessible under OPRA." Id. at 23.

The Appellate Division recognized that although section 10 of OPRA exempts personnel records from disclosure, it also contains an exception for

[1] As discussed in more detail later, N.J.S.A. 47:1A-10 (section 10) states that personnel records are not "considered . . . government record[s] and shall not be made available for public access." The section also contains three exceptions; the first declares that "an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record." Ibid.

certain information Libertarians had requested in this case. Id. at 24. Nonetheless, although the court "acknowledge[d] the matter is not altogether free from doubt," it "conclude[d] OPRA does not generally require government agencies to make exempt personnel and pension records accessible in redacted form." Ibid. "[T]he mention of an employee's name . . . [and] date and reason of separation . . . does not make that document a government record publicly accessible under OPRA, redacted to exclude all other information." Id. at 28.

The court recognized, however, that allowing agencies to provide information rather than actual documents requires "trust [in] what the government" reveals -- a "problem" that "is well-illustrated" by the County's response to Libertarians' request. Id. at 29.

The Appellate Division remanded the matter to the trial court to determine whether the settlement agreement should be disclosed under the common law right of access. Id. at 31. The court also reversed the order for fees. Ibid.

We granted Libertarians' petition for certification. 245 N.J. 38 (2021). We also granted leave to appear as amici curiae to the Reporters Committee for Freedom of the Press along with thirteen media organizations (Reporters Committee) and the American Civil Liberties Union of New Jersey (ACLU).

II.

Libertarians urges the Court to reinstate the trial court's ruling. It asserts it is entitled to a redacted version of the settlement agreement based on two exceptions in section 10. Libertarians argues that Ellis's "name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received" is a government record. The statute's plain language, according to Libertarians, required the County to disclose the settlement agreement with redactions, and not just a summary of the information. Libertarians also contends that because public entities must provide immediate access to individual employment contracts under section 5(e) of OPRA, and because an agreement ending Ellis's employment qualifies as an employment contract, the settlement agreement must be disclosed under another part of section 10. Libertarians stresses that the outcome of this case will have far-reaching consequences for transparency in policing and sexual abuse in jails.

The Reporters Committee and the ACLU support Libertarians' position. The Committee emphasizes OPRA's mandate to "segregate" or redact exempt parts of a government record from public access while still allowing access to the record itself. The Committee also argues that public records laws like

OPRA advance the public interest by enabling journalists to report on the conduct of public institutions and employees.

The ACLU highlights the importance of transparency in corrections facilities, where it contends abuse is rampant and underreported. Public access to settlement agreements, the organization asserts, will help curb abuse by creating accountability.

Cumberland County argues the judgment of the Appellate Division should be affirmed. The County contends that just because Libertarians is entitled to certain information under section 10, it is not entitled to disclosure of the settlement agreement itself, which is an exempt personnel record. An overly broad reading of the exception in section 10, according to the County, would swallow the general rule protecting personnel records from public access. The County also maintains that the agreement is not an "individual employment contract" subject to disclosure under section 5(e).

In addition, the County submits that OPRA protects important privacy interests of employees and does not substantially impede the public's interest in access and transparency.

III.

A.

This appeal involves the interpretation of a statute. To understand the meaning of the Open Public Records Act, we look for the Legislature's intent. See DiProspero v. Penn, 183 N.J. 477, 492-93 (2005). We begin with the text of the statute because the language the Legislature chooses is "generally . . . the best indicator of [its] intent." Id. at 492.

OPRA is designed to provide the public with "ready access to government records." Burnett v. County of Bergen, 198 N.J. 408, 421 (2009). The law declares at the outset that "all government records shall be subject to public access unless exempt." N.J.S.A. 47:1A-1. Plus "any limitations on the right of access . . . shall be construed in favor of the public's right of access." Ibid.

The statute broadly defines the term "government record." The phrase includes any documents "made, maintained or kept on file in the course of . . . official [government] business." Id. § 1.1. In the same section, OPRA exempts more than twenty different types of information from the definition. Ibid. None of them apply here.

OPRA also calls for a careful balancing of competing interests -- the right of access to government records versus the need to protect personal

information. Burnett, 198 N.J. at 414. One way to achieve that balance is through targeted redactions of information that should not be disclosed. More generally, if part of a record is exempt from public access, the records custodian is authorized to redact that portion of the document and must then "promptly permit access to the remainder of the record." N.J.S.A. 47:1A-5(g).

Section 10 of OPRA addresses personnel records. Most personnel records are exempt from disclosure under the law, but the statute has three exceptions. Section 10 reads as follows:

> Notwithstanding the provisions of L. 1963, c. 73 ([N.J.S.A.] 47:1A-1 et seq.) or any other law to the contrary, the personnel or pension records of any individual in the possession of a public agency, including but not limited to records relating to any grievance filed by or against an individual, shall not be considered a government record and shall not be made available for public access, except that:
>
> [1] an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record;
>
> [2] personnel or pension records of any individual shall be accessible when required to be disclosed by another law, when disclosure is essential to the performance of official duties of a person duly authorized by this State or the United States, or when authorized by an individual in interest; and
>
> [3] data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government

> employment or for receipt of a public pension, but not including any detailed medical or psychological information, shall be a government record.
>
> [(emphases added).]

This appeal turns on the first exception.

In 1974, Governor Byrne issued Executive Order 11, which mirrors section 10. Exec. Order No. 11 (EO 11) (Nov. 15, 1974), 1 Laws of New Jersey 1974 765. EO 11 exempted personnel records from disclosure under the Right to Know Law, which preceded OPRA. Like OPRA, the executive order contained language that parallels section 10 and provided that an individual's name, date of separation from government service, reasons for separation, and other details "shall be public." Ibid.

B.

We review questions of statutory interpretation de novo. See Brennan v. Bergen Cnty. Prosecutor's Off., 233 N.J. 330, 339 (2018). Our analysis here is tethered to the language of the statute.

Public agencies have an obligation to disclose "government records." N.J.S.A. 47:1A-1. And under OPRA, the records themselves -- and not a summary -- must be made available "for inspection, copying, or examination." Ibid. Custodians, however, must redact parts of a document that are exempt from public access before disclosing a government record. Id. § 5(g).

Section 10 expressly states that a person's "date of separation" from employment "and the reason therefor . . . shall be a government record." Id. § 10. As a result, a plain reading of the text calls for disclosure of a settlement agreement that contains such information once the document has been redacted.

Section 10 can also be analyzed in a more nuanced way that leads to the same outcome. The provision exempts personnel records, including records relating to a grievance, from disclosure. Ibid. Yet section 10 also provides an exception to that exemption by declaring that a person's "date of separation and the reason therefor," along with certain other details, constitute a "government record." Ibid. Either way, records that contain those details, kept by a public agency, must be made available for inspection with appropriate redactions.

This is not the first time the Court has interpreted an exception in section 10. In Kovalcik v. Somerset County Prosecutor's Office, for example, the Court considered the third exception. 206 N.J. 581 (2011). In that case, Kovalcik sought copies of curricula vitae for two detectives, "as well as a list of any courses relating to interrogation and confessions" they had taken. Id. at 584. The prosecutor's office argued the documents were exempt from

disclosure as personnel records under section 10 as well as another ground not relevant here. Id. at 585-86.

In its review of the third exception in section 10, the Court explained the exception "narrow[s] the mandate of disclosure" to "a specific, or particular, educational qualification that is a prerequisite" for a government position "and only if the record demonstrates compliance with that specific requirement is it subject to being disclosed pursuant to OPRA." Id. at 593 (emphasis added). Under the statute's plain language, the Court observed, a "document in dispute can only be found to be within the exception to the exemption if it discloses, and only to the extent that it discloses, that [a detective] had completed specific training or education that was required for her employment . . . with the Prosecutor's Office." Id. at 593-94 (emphasis added).

Because the Court could not tell from the record whether the document fell within the exception, it remanded the matter to the trial court "to apply the statute in accordance with the analysis [it] set forth." Id. at 594-95. From the Court's analysis and instructions, this much is clear: if the document contained information that brought it within the third exception, OPRA called for its disclosure after any appropriate redactions. See also S. Jersey Publ'g Co. v. Expressway Auth., 124 N.J. 478, 495-96 (1991) (finding that the exemption for personnel records in EO 11 did not prevent the release of

minutes that "undoubtedly include the reasons for . . . termination of employment").

In this appeal, part of the settlement agreement that Libertarians seeks contains information covered by section 10's first exception. For similar reasons, the document is subject to disclosure after it is redacted.

Our reading of section 10 does not render parts of it superfluous. The first exception, for example, lists specific details that must be disclosed: a person's name, title, position, salary, payroll record, length of service, date of separation, the reason therefor, and the amount and type of the individual's pension. N.J.S.A. 47:1A-10. Other details that are not listed in the exception but constitute personnel records would still be exempt from disclosure.

Other OPRA exemptions raised by the County do not prevent disclosure either. OPRA safeguards an individual's personal information when disclosure would violate a person's reasonable expectation of privacy. Id. § 1. Section 10, once again, specifically calls for the release of the information sought here, and any additional exempt or confidential information would be subject to redaction. Because there is no colorable claim of privacy on this record, there is no need to apply the balancing test set forth in Burnett. See Brennan, 233

N.J. at 333. No reasonable claim of privacy can justify withholding Ellis's settlement agreement from disclosure.[2]

We recognize that some requestors may be satisfied to receive a written summary of information in response to an OPRA request. But OPRA entitles them to press for actual government records in many situations, which they can then inspect.

The Legislature acknowledged the distinction between providing information and actual records in different settings. The statute, for example, directs that certain "information" about ongoing criminal investigations shall be made available to the public. Id. § 3(b) (emphasis added). Elsewhere, the Legislature directs that "government records," as opposed to information, be disclosed. Id. § 1.

Under section 10, the reasons Ellis separated from government service qualify as a "government record." A settlement agreement that includes those details must therefore be made available to the public once it is redacted.[3]

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[2] The County no longer argues that OPRA's exemption for access to records of investigations in progress applies. See N.J.S.A. 47:1A-3.

[3] Libertarians does not argue or suggest that every personnel document with a person's name or title in it must be available for inspection -- with all but those details redacted -- under the plain language of section 10's first exception. If faced with that position in another case, courts could readily address it. See Bozzi v. City of Jersey City, 248 N.J. 274, 283 (2021) (noting that courts can

In deciding this appeal, we do not rely on case law about settlement agreements that public entities enter into to resolve a lawsuit. See Asbury Park Press v. County of Monmouth, 406 N.J. Super. 1, 9 (App. Div. 2009) (noting that the public has a "right to know the business of the courts" and "a right of access to court documents filed in civil lawsuits"), aff'd, 201 N.J. 5 (2010). Nor do we reach plaintiff's and the ACLU's argument that a settlement agreement ending a person's employment is an "employment contract," which an agency must grant "[i]mmediate access" to under section 5(e). We begin and end our analysis with the plain language of section 10 discussed above. Our reading of that section comports with OPRA's command to construe the statute "in favor of the public's right of access." N.J.S.A. 47:1A-1.

OPRA enables the public to play a role in "guarding against corruption and misconduct." Burnett, 198 N.J. at 414. This case underscores those principles. In response to plaintiff's OPRA request, the County stated that Ellis was terminated because of his misconduct as a corrections officer. The trial judge, who reviewed the settlement agreement in camera, called the statement a misrepresentation. In reality, according to the minutes of the

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look to extrinsic evidence if a statute's plain language would lead to an absurd result); DiProspero, 183 N.J. at 493 (same).

Retirement Board, after Ellis admitted that he had "inappropriate relationships with two inmates," he was allowed to retire in good standing with only a partial forfeiture of his pension. Without access to actual documents in cases like this, the public can be left with incomplete or incorrect information.

"[G]overnment works best when its activities are well-known to the public it serves." Ibid. In that regard, access to public records fosters transparency, accountability, and candor. That applies to questions about sexual abuse in prison as well as the overall operation of prison facilities and other aspects of government.

Libertarians was and is entitled to a redacted version of the actual settlement document.

C.

The trial judge awarded attorney's fees to Libertarians as the prevailing party under N.J.S.A. 47:1A-6. Afterward, the parties agreed on the amount of counsel fees. The trial court's order, reversed on appeal, is reinstated.

We do not consider the scope of the redactions the trial judge approved, which the parties did not appeal.

IV.

For the reasons set forth above, we reverse the judgment of the Appellate Division.

JUSTICES ALBIN, PATTERSON, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

FILED, Clerk of the Supreme Court, 11 Sep 2020, **084867**

SUPREME COURT OF NEW JERSEY
DOCKET NO.

RICHARD RIVERA, Plaintiff-Petitioner, v. UNION COUNTY PROSECUTOR'S OFFICE and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office, Defendants-Respondents, and CITY OF ELIZABETH, Defendant-Intervenor-Respondents.	ON PETITION FOR CERTIFICATION FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A-002573-19 A Civil Action Sat Below: Richard J. Geiger, J.A.D. Arnold L. Natali, Jr., J.A.D.

PLAINTIFF'S BRIEF & APPENDIX IN SUPPORT OF PETITION FOR CERTIFICATION

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07601
Ph: (201) 488-8200
F: (201) 488-5556
cgriffin@pashmanstein.com

Attorneys for Plaintiff, Richard Rivera

On the Brief:
CJ Griffin, Esq. (031422009)

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STATEMENT OF THE MATTER INVOLVED

This case relates to the public's right to see records of sustained findings of blatant racism and misogyny within the highest ranks of a municipal police department. The Appellate Division concluded below that not only are the internal affairs (IA) reports relating to that appalling behavior exempt from access under the Open Public Records Act (OPRA), but also that IA reports are always categorically exempt from access even under the common law right of access, no matter how compelling the facts and circumstances are. In fact, it denied access under the common law even though the trial court never reached that issue and the parties never addressed it in their appellate briefing.

The IA reports at issue relate to James Cosgrove, who was Police Director of the Elizabeth Police Department (EPD). In April 2019, the media reported that the Union County Prosecutor's Office (UCPO) had conducted an IA investigation and concluded that Cosgrove had used racist and sexist language in the workplace. Allegedly, he used the n-word and c-word. [Da26-27; 322].[1]

Almost immediately, advocates and newspapers called for Cosgrove to be fired or to step down. See Bigot, Begone: Fire The Elizabeth Top Cop, Star Ledger (April 26, 2019). Joining them was Attorney General (AG) Gurbir S. Grewal, who issued a public statement confirming that UCPO had "completed a two-month [IA] investigation into the conduct of . . . Cosgrove and concluded

[1] Da = Def. App. Div. Appendix;
PCa = Plaintiff's Petition for Certification Appendix;
1T = January 24, 2020 Decision Transcript

that, over the course of many years, Director Cosgrove described his staff using derogatory terms, including racist and misogynistic slurs." [Da35]. The AG demanded that Cosgrove resign and appointed a new Acting Prosecutor to conduct an audit of the EPD.

The mayor of Elizabeth refused to fire Cosgrove or call for his resignation. Instead, he lodged public attacks at the media, calling them the "lynch mob." See S.P. Sullivan, N.J. Mayor Won't Talk About His Police Department Leader Accused Of Racism. Instead, He Turns His Fire On The Media, NJ Advance Media (April 29, 2019) (including Mayor's tweet that "Trump reference to #Fake News resonates"). Nonetheless, Cosgrove did finally resign.

Plaintiff is co-chair of the Latino Leadership Alliance's Civil Rights Protection Project. [Da3]. He filed a request with UCPO seeking a copy of the IA reports concerning Cosgrove pursuant to OPRA and the common law. After UCPO denied the request, Plaintiff filed this lawsuit. The City of Elizabeth intervened and defended the denial.

The trial court held that the IA reports were not exempt pursuant to OPRA's personnel records exemption or the AG's Internal Affairs Policy and Procedures (IAPP). [1T16]. The court ordered UCPO to produce the IA reports for an *in camera* review, so that it could redact information that would identify a complainant, witness, or otherwise be inappropriate to release. [PCa20]. Plaintiff never objected to such redactions. Because it had concluded that access should be granted under OPRA, the trial court

did not reach Plaintiff's common law claim to the records.

Before UCPO even produced the records for *in camera* review, the Appellate Division entered a stay and agreed to hear Defendants' interlocutory appeal. On June 19, 2020, nearly a month into nationwide protests against police brutality and racism, the Appellate Division reversed the trial court and issued a decision ensuring that the Cosgrove IA reports would never see the light of day. [PCa22]. It not only concluded that the reports were exempt from access under OPRA, an issue no court has ever addressed in a published opinion, but it also ruled that all IA records are categorically exempt from access under the common law too.

The Appellate Division's common law decision surprised Plaintiff, given that: (1) the trial court never reached the common law issue; (2) the parties never briefed common law access before the Appellate Division or discussed it at oral argument; and (3) neither court had ever even reviewed the records *in camera* to determine what type of material they contain. Without ever having seen the Cosgrove IA reports and without having afforded Plaintiff any opportunity to argue that his interest in access outweighed UCPO's interest in non-disclosure, the Appellate Division simply concluded that the common law balancing test weighed in favor of secrecy based on its speculation as to what the IA reports "likely" contained and its assumption that they "probably" could not be sufficiently redacted to protect the identity of the complainants.

Because the decision was at odds with volumes of case law that says a *trial court* is the court who should conduct the

"exquisite weighing process" that balances the requestor's interest in disclosure against the government's interest in confidentiality, Plaintiff moved for reconsideration. Plaintiff asked for a remand to the trial court so an *in camera* review could occur and common law arguments could be made.

The Appellate Division denied the motion, rejecting the argument that it needed to perform a "painstaking document by document examination" because its reasons for concluding that IA records are exempt from access under OPRA "apply with equal force" to the common law. [PCa54]. In other words, the court held that because IA records are exempt from access under OPRA they can also *never* be accessed under the common law under any circumstances. There is no avenue for the public to ever access IA reports according to the Appellate Division's decision.

The decision below comes at a time when there are daily protests in support of Black Lives Matter taking place across this nation. The public is demanding greater transparency and accountability in policing and rightly criticizing systemic racism within our criminal justice system. Cosgrove's racist behavior created a wound in Elizabeth that has not healed and the public remains upset that its mayor refused to call for his resignation. See, e.g., Rebecca Panico, N.J. City To Paint Black Lives Matter On Street. Why Local Activist Won't Join In., Star Ledger (July 31, 2020). The decision below that IA reports can never be accessed under the common law, not even in the most compelling cases, deprives the residents of Elizabeth from reviewing the

Cosgrove IA report and determining whether there are any current Elizabeth public officials or police supervisors who knew about Cosgrove's long-time bigotry and did nothing about it. The decision deprives the public of its right to hold its government officials fully accountable for the racism that occurred within the highest ranks of the EPD and that no doubt spilled over into the way EPD police officers treated the public.

QUESTIONS PRESENTED

1. Whether the AG can exempt records from access under OPRA via an un-promulgated policy or directive?

2. Whether IA reports are subject to access under OPRA?

3. Whether IA reports are categorically exempt under the common law right of access in all circumstances, even in compelling cases of sustained allegations of racism?

ERRORS COMPLAINED OF AND COMMENTS CONCERNING THE OPINION

I. THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE ATTORNEY GENERAL'S INTERNAL AFFAIRS POLICY EXEMPTS RECORDS FROM OPRA

The Appellate Division erred in concluding that the AG has the authority to exempt a record from access through an un-promulgated policy like the IAPP. The Appellate Division reached its conclusion by citing to N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541 (2017) and O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009), two decisions that held that the AG's un-promulgated Use of Force Policy had the "force of law" and thus defeated one of OPRA's exemptions. Respectfully, the Appellate Division conflated two very different standards.

In Lyndhurst, 229 N.J. 541, this Court evaluated OPRA's criminal investigatory records (CIR) exemption, which exempts records relating to a criminal investigation unless they are "required by law to be made, maintained, or kept on file." N.J.S.A. 47:1A-1.1. The Court examined what types of laws could render a document "required *by law* to be made" and thus not subject to the exemption. At issue were use of force reports (UFRs), which are required to be completed every time an officer uses force against a subject per the AG's Use of Force Policy. Lyndhurst, 229 N.J. at 565. The State argued that only statutes, regulations, and executive orders were "laws" and therefore UFRs were exempt, even though the AG's policy required them to be made. See id. at 562.

The Supreme Court first noted that the definition of government record was "broad," as was the term "required by law." Id. at 566. It also noted that every exemption was to be construed in favor of access. Ibid. The Court further recognized that the AG is the State's chief law enforcement officer with the power to issue policies that are binding upon subordinate law enforcement agencies. Id. at 565 (citing N.J.S.A. 52:17B-98). Accordingly, the Court concluded that the AG's Use of Force Policy had the "force of law" and satisfied the CIR exemption's "required by law" standard, rendering UFRs subject to access. Ibid. Accord O'Shea, 410 N.J. Super. at 382.

The standard for exempting a record from access under OPRA, however, is very different from the standard that excludes records

from the CIR exemption's reach and renders them subject to public access. By its plain language, the CIR exemption does not enumerate the specific types of laws that could render a record "required *by law*" to be made, maintained, or kept on file. N.J.S.A. 47:1A-1.1. Instead, it simply contains the broad term "law" and this Court determined that the term "law" was broad enough to include policies that carry the "force of law."

Although the Legislature uses the generic term "law" in the CIR exemption and in other exemptions listed in N.J.S.A. 47:1A-1.1, the Legislature did *not* use such broad language in N.J.S.A. 47:1A-1 and -9 when it enumerated the laws that could create an exemption. Instead, it chose to be very specific[2] in enumerating the precise types of laws that could create an exemption: "any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order." N.J.S.A. 47:1A-1. Accord N.J.S.A. 47:1A-9.

The Legislature did not include AG policies on that list. Whether AG policies have the "force of law" for purposes of the CIR exemption and whether subordinate law enforcement agencies must generally comply with those policies are separate and distinct questions from whether the AG has the authority to exempt

[2] This comports with the statute's instruction that exemptions should be narrowly construed in favor of access and OPRA's dictate that records should be readily accessible for public access. N.J.S.A. 47:1A-1. It is difficult to exempt records, but not difficult to render them subject to access.

government records from access or to compel law enforcement agencies to deny access to non-exempt government records per a written policy.[3] See Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 272 (App. Div. 2010) (holding executive order cannot override a statute and essentially repeal it); O'Shea, 410 N.J. Super. at 385 ("We are, in this matter, guided by the concept that administrative actions, including those stated in or imported to duly promulgated rules and regulations, cannot override a legislative enactment such as OPRA.").

The Appellate Division erred in conflating the two standards; the AG cannot exempt records via a policy.

II. THE APPELLATE DIVISION ERRED IN CONCLUDING THAT INTERNAL AFFAIRS REPORTS ARE CATEGORICALLY UNACCESSIBLE UNDER THE COMMON LAW IN ALL CIRCUMSTANCES

The Appellate Division erred in concluding that IA reports are categorically exempt from access under the common law, no matter how compelling the interest in disclosure is or which particular IA records are at issue. The court essentially decided that where a record is exempt under OPRA, it must also be exempt under the common law. This is simply not true.

OPRA expressly states that "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency." N.J.S.A. 47:1A-8. See also Mason v.

[3] No reasonable person would argue that the AG could simply issue a policy tomorrow with a long list of records he considers to be exempt and instructing subordinate law enforcement agencies to withhold them. The AG lacks any such authority.

City of Hoboken, 196 N.J. 51, 67 (2008) ("The common law definition of a public record is broader than the definition contained in OPRA."). Therefore, even in cases where a record is exempt from access under OPRA, a balancing test must be performed to determine whether access should be granted under the common law.

For example, in Gilleran v. Township of Bloomfield, 227 N.J. 159 (2016), this Court held that security camera footage was exempt from access under OPRA because the "broad brush of compelled release under OPRA, on demand for any or no reason" would pose security threats. But, the Court also held that security footage could be accessed under the common law right of access where a requestor stated a sufficient interest in the footage. Id. at 177 ("For example, an accident occurring in an area surveilled near a public building or an incident of claimed brutality or misconduct captured on a facility's security videotape may provide a legitimate interest to justify a partial disclosure under the common law right of access.").

Similarly, in Lyndhurst, 229 N.J. at 569, this Court concluded that dash camera footage, witness statements, and investigative reports were not subject to OPRA because they fell subject to OPRA's criminal investigatory records exemption. Nonetheless, the Court held that dash camera footage that related to a police-involved shooting should be released under the common law because the public's interest in disclosure was significant. Id. at 580. Accord Paff v. Ocean Cty. Prosecutor's Office, 235 N.J. 1, 30 (2018) (remanding to trial court for common law balancing test for

dash camera footage). Further, although the Court held that the investigative reports that had been requested within hours of the shooting could not be released under the common law because disclosure could harm the investigation, it noted that the "timing of a request may affect the balancing process." Lyndhurst, 229 N.J. at 580, n. 10. Thus, the Court left the door open that the reports would be accessible under the common law in other circumstances, such as where a request was made after the investigation had concluded.

Even before OPRA was enacted, this Court recognized that the common law right of access is greater than the statutory right of access and thus it granted access to records under the common law where they were not subject to the Right to Know Law (RTKL). In Home News v. State, Dep't of Health, 144 N.J. 446 (1996), a newspaper sought a cause of death for a little boy whose body had been found after he had been missing for months. This Court held that the cause of death was not accessible under the RTKL because a regulation exempted that information. In considering the newspaper's right to access the cause of death under the common law, the Court concluded that the "existence of a regulation is not dispositive of whether there is a common-law right to inspect a public record, but it weighs 'very heavily' in the balancing process as a determination by the Executive Branch of the importance of confidentiality." Id. at 455. Noting that the "public's interest in the story [was] undeniable," the Court granted access to the cause of death information under the common

law because the newspaper's "interest in receiving the cause-of-death information outweigh[ed] the importance of preserving the confidentiality of the death certificate it seeks." Id. at 458.

There is similarly no categorical rule that excludes IA reports from access under the common law even if a court concludes they are exempt from access under OPRA. If a court decides not to grant access to IA records under OPRA, it must conduct a common law balancing test and consider the specific facts of the case. The Appellate Division in this case recognized that the balancing test requires an "exquisite weighing process" and that courts must "look in particular at the level of detail contained in the materials requested." Lyndhurst, 229 N.J. at 580. Nonetheless, it refused to actually look at the actual IA reports at issue *in camera* to determine what type of information is within them.

The IA reports at issue in this case are not part of the record, nor were they ever reviewed by the trial court or the Appellate Division.[4] Without having seen the actual reports at issue, and perhaps never having seen *any* internal reports in any other case before either, the Appellate Division blindly concluded that the common law balancing test weighed in favor of non-disclosure. The court's decision was entirely speculative, stating:

> While we recognize that the trial court intended to redact the names and identifying circumstances to protect the complainants and witnesses from retribution and

[4] It is unclear if the counsel for Elizabeth and UCPO or their records custodians have ever even seen them either, nor did anyone certify as to any details about their *actual* contents.

> intimidation, **that task would likely prove very difficult, if not impossible**. . . . Because the complainants and witnesses are members of the EPD, their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their identity or narrow the field to only a few individuals, even if all personally identifiable information is redacted. **Other members of the EPD, as well as Cosgrove himself, could probably deduce who reported the behavior.**
>
> [PCa43-44] (emphasis added).]

Respectfully, without seeing the actual documents, the court had no way whatsoever to know whether those concerns ring true and it should have remanded the matter back to the trial court for an *in camera* review. Our courts have repeatedly held that mere speculation is insufficient to warrant a denial of access. See, e.g., Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 383 (App. Div. 2003)

Perhaps most troubling is that the Appellate Division rushed to deny access to the IA reports without even affording Plaintiff the opportunity to make any common law arguments. The trial court never reached the issue of common law access. There was no appellate briefing or argument on the issue. Thus, Plaintiff was never given an opportunity to explain why IA reports should not be categorically exempt from access under the common law and why the records at issue in this case in particular warranted public disclosure.

REASONS WHY CERTIFICATION SHOULD BE GRANTED

This petition meets multiple criteria for granting certification pursuant to Rule 2:12-4, as detailed below.

A. An Unsettled Question of Public Importance

This petition presents an unsettled question of general public importance that should be settled by the Court.

The issues in this case are obviously very significant. The tragic murder of George Floyd by Minneapolis police officers has served as wakeup call to many Americans about racism in this country. A June 2020 Monmouth University poll revealed that 76 percent of Americans now agree that racial and ethnic discrimination is a "big problem," an increase of 25 point since 2015. See Giovanni Russonello, A 'Seismic Shift' in the Views on Racism in America, N.Y. Times (June 6, 2020). Hundreds of thousands of people have protested across this nation in support of Black Lives Matter, including here in New Jersey. Those protestors are demanding a broad range of police and criminal justice reforms. Transparency is a necessary first step to other policing reforms because the public must be able to identify problems before a solution can be found.

Even more importantly, transparency is an important component of improving police-community relations, something that is significantly undermined where there is officer misconduct or sustained findings of racism like occurred in this case. When law enforcement officers have earned the trust and respect of the community, community members are more likely to comply with police commands, come forward as witnesses to crimes, and report crimes that are perpetuated against them. See, e.g., Tracey Meares, Policing: A Model for the Twenty-First Century, *in* Policing the

Black Man 165 (Angela J. Davis ed., 2018) ("If the police are trusted, then people are more likely to give them the benefit of the doubt, allowing them to investigate and to respond to contentious law enforcement actions.").

Despite how critical it is that members of the public trust law enforcement, polls show that approximately half of the public lacks confidence in the police. See Erik Bakke, Predictive Policing: The Argument for Public Transparency, 74 N.Y.U. Ann. Surv. Am. L. 131, 147 (2018). When surveys are broken down by race, the level of trust in police dips even further. See Doug Criss, The One Thing That Determines How You Feel About the Police: Your Age, Race or Political Leaning Play a Role,[5] CNN (July 14, 2017) (observing that 61 percent of whites have confidence in the police, while only 45 percent of Latinos and 30 percent of Blacks have confidence);

Transparency is a core component to building public trust. See Joseph A. Schafer, The Role of Trust and Transparency In the Pursuit of Procedural and Organizational Justice, 8 Journal of Policing, Intelligence and Counter Terrorism 135 (2013) ("[P]ublic support, cooperation or involvement is more likely to be found in [police] forces that have created higher degrees of external trust and transparency."). Shielding police IA and disciplinary records from the public in particular is one action that significantly reduces trust in law enforcement and causes the community to believe that corrupt officers are being protected and misconduct

[5] https://cnn.it/2NY7P8H

is being swept under the rug. See Cynthia H. Conti-Cook, A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public, 22 CUNY L. Rev. 148, 166 (2019) (for the community to believe that police are being held accountable, they need "access to the charges, common law decisions, proceedings, and outcomes in order to see justice for themselves"). Secrecy causes distrust in police to fester.

Cosgrove violated the public's trust. That trust is not easy to repair and impacts the public's view of the EPD as a whole. Transparency is important to show the public exactly what occurred, how long it went on, and whether there were other public officials, such as the mayor, who knew that Cosgrove's racist and sexist behavior was ongoing for years and did nothing about it. Only through transparency can the public be sure that there was real accountability. See Paff, 235 N.J. at 36 (Albin, J., dissenting) ("The public -- particularly marginalized communities -- will have greater trust in the police when law enforcement activities are transparent.").

In response to the national protests, the AG modified the IAPP to require disclosure of the names of all police officers who receive "major" discipline, i.e. termination, demotion, or a suspension of 5 days or more. Unfortunately, several police unions filed immediate challenges to the policy change and were able to obtain temporary stays from the Appellate Division until their appeals are heard. Those appeals are still pending.

In the interim, the AG testified during a "police reform hearing" before the Legislature in July that he believes New Jersey should provide access to IA files as many other states do. The AG testified:

> But despite all of this good work, there's one area where New Jersey lags behind the pack. We are one of a shrinking number of states where police disciplinary records remain shrouded in secrecy, virtually never seeing the light of day. In recent months, I have come to recognize that our policy isn't just bad for public trust, it's bad for public safety, and it's time for our policy to change.
>
> Last month, I announced my intention to publish the names of law enforcement officers who have received major discipline -- that is, those officers who have been fired, demoted, or suspended for more than five days. Those plans are now on hold, pending the resolution of ongoing litigation.
>
> . . .
>
> New Jersey's extremely strict confidentiality is not an example of standard practice across the country. It makes us the outlier. A majority of states already release the names of disciplined officers, and many also make at least some additional information available. Some states go much further, making the entire disciplinary file public -- not just a summary of findings, but the underlying documents that gave rise to those findings. . . .
>
> This has been the policy in New Jersey for so long that for many of us, myself included, began to take it for granted. But I've now come to realize that the approach is wrong. Other states have moved away from confidentiality because they rightfully recognize that transparency promotes accountability, and, in turn, greater trust.
>
> . . .

> Simply put, this is both a historical moment and a moral moment in which we find ourselves in our country's history. And it offers us a unique opportunity to prevent further injustices, to strengthen police-community relations, and to improve public safety. We simply cannot let this moment go to waste. Although I have broad authority under the IAPP to release information regarding police discipline, it appears likely that many of these efforts, no matter how legally sound, will be delayed through litigation by those intent on preserving the status quo.
>
> . . .
>
> . . . when it comes to the transparency of police disciplinary records, New Jersey needs to end its outlier status and move towards greater openness. We can and should be a national leader on this issue.
>
> [Public Hearing, Senate Law & Public Safety Comm. (July 15, 2020).

Thus, although the AG embraced full access to IA files, he recognized that any changes he makes to the IAPP would no doubt result in additional litigation by the police unions.

The AG is right that IA transparency is needed and that it would build community trust and weed out "bad cops." Plaintiff believes the AG is wrong that IA files are not currently accessible under OPRA, however; no published opinion has ever concluded such. But, at a minimum, the AG's testimony supports the conclusion that the common law should be used as a vehicle to obtain access to IA files, especially in compelling cases like this one.

The Appellate Division's decision makes that access impossible. It concluded that IA files can never be accessed under the common law because they are per se exempt, no matter who the requestor is, how compelling the interest in disclosure is, or

what type of conduct is described in the IA reports. That per se rule warrants review.

This Court has never determined whether IA reports are accessible under OPRA or the common law right of access. No published court opinion has ever addressed these issues either. Instead, there have been unpublished opinions from trial courts and the Appellate Division that have reached different conclusions about both modes of access. Compare, e.g., Paff v. Bergen County, no. A-1839-14T1 (App. Div. Mar. 13, 2017) (holding that IA index files are exempt under OPRA and common law) to Gannett Satellite Info. Network v. Neptune Twp., no. MON-L-2616-17 (Law Div. Aug. 1, 2018) (holding IA records and reports relating to officer who killed is ex-wife were accessible under the common law) [PCa7; PCa66].

In 2019, this Court granted certification in Libertarians for Transparent Gov't v. N.J. State Police, no. 083079, which presented the issue of whether the public was entitled to the name of a state trooper who engaged in "racially offensive behavior" or whether the IAPP exempted such information. Libertarians was recently settled and dismissed, thus the Court will not reach the issue. This case presents a similar question of law and asks the Court to analyze the interplay between OPRA and the IAPP; indeed, Defendants repeatedly cited to Libertarians in support of their position.

B. Conflicting Decisions

As detailed above, there are numerous conflicting unpublished appellate and trial court decisions. This Court's supervision is

required to resolve the conflict, otherwise requestors will continue to receive wildly different outcomes from the lower courts, with transparency sometimes being advanced and other times absolute secrecy being permitted.

C. The Interest of Justice Mandates Certification

The interest of justice warrants certification where a decision is "palpably wrong, unfair or unjust" and involves the interests of more than just the parties to the dispute. Mahony v. Danis, 95 N.J. 50, 52 (1983). In this case, the Appellate Division's decision is palpably unfair, wrong or unjust because it issued a decision on the common law where that issue was not briefed or argued by the parties. Plaintiff had no opportunity to explain why there is no per se rule against common law access to IA records and why common law access is warranted in this case.

Importantly, the holding below will impact every member of the public or journalists who seek to learn more about racism in a police department and police misconduct in general. New Jersey's IA and police disciplinary records are shrouded in complete secrecy and very rarely has anyone been granted common law access.[6] The only reason that the public learned about Cosgrove's racist and sexist behavior was because the complainants went to the press. [Da121]. After the press wrote about it, the AG issued a public

[6] Few common law records suits are filed because many courts have assumed that legal fees are not available to prevailing parties in common law records case, despite language in Mason, 196 N.J. at 79 to the contrary. Plaintiff pleaded the common law and argued he was entitled to legal fees if he prevailed under the common law, therefore that is also an issue in this case.

statement calling for Cosgrove's resignation and numerous organizations called for him to be fired or step down. What if the complainants had not gone to the press? There is a very strong likelihood that the public would have never found out about Cosgrove's deplorable behavior. Perhaps he would have quietly retired or perhaps he would have retired and moved on to another police department. The scariest possibility is that he may have simply continued leading the EPD because the City's mayor refused to condemn him or fire him. The public deserves full transparency and accountability.

If OPRA's purpose of "guarding against corruption and misconduct" is to have any meaning, Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012), then its provisions must not be interpreted in a manner that would permit a lone AG to issue a policy that exempts police IA records from public access. At a time when the national conversation is so heavily focused on exposing racism and police misconduct, the Appellate Division sadly opted to make New Jersey *more* secretive and deprive the public of *any* path to obtain police IA records. That decision is deeply troubling and warrants this Court's review.

CONCLUSION

For all of the above-referenced reasons, it is respectfully requested that the Court grant Certification in this case.

/s CJ Griffin
CJ GRIFFIN

Dated: 8/18/20

RULE 2:12-7 CERTIFICATION

I certify that this Petition presents substantial questions and is filed in good faith and not for purposes of delay.

/s CJ Griffin
CJ GRIFFIN

Dated: 8/18/20

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
UNION COUNTY, NEW JERSEY
DOCKET NO. UNN-L-002954-19
APP. DIV. NO. _____

RICHARD RIVERA,	:	
	:	
Plaintiff,	:	TRANSCRIPT
	:	
v.	:	OF
	:	
UNION COUNTY PROSECUTOR'S OFFICE, ET AL.,	:	MOTION
	:	
	:	
Defendants.	:	

PLACE: Union County Courthouse
2 Broad Street
Elizabeth, New Jersey 07207

DATE: January 24, 2020

BEFORE:

THE HONORABLE JAMES HELY, J.S.C.

TRANSCRIPT ORDERED BY:

CHRISTINA M. DIPALO, ESQ., (LaCorte, Bundy, Varady & Kinsella))

APPEARANCES:

MICHAEL J. ZOLLER, ESQ., (Pashman, Stein, Walder, Hayden, PC)
Attorney for the Plaintiff

APRIL C. BAUKNIGHT ESQ., (Union County Counsel's Office)
Attorney for the Defendant, Union County Prosecutor's Office

ELLEN HALL
AUTOMATED TRANSCRIPTION SERVICES
P.O. Box 1582, Laurel Springs, New Jersey
(856) 784-4276 (856) 784-7245 (fax)
autotranscripts@comcast.net

Digitally Recorded, Operator - Blair R. Banks

APPEARANCES: (Continued)

ROBERT F. VARADY, ESQ. - and - CHRISTINA M. DIPALO, ESQ., (LaCorte, Bundy, Varady & Kinsella)
Attorneys for the Intervenor, City of Elizabeth

I N D E X
01/24/20

(Proceedings begin at 9:41 a.m.)
COURT OFFICER: All, rise. Superior Court is now in session. The Honorable Judge James Hely presiding.
THE COURT: Okay. Please be seated. This is the case of Rivera versus Union County Prosecutor's Office, Docket Number UNION-L-2954-19. Appearances, please.
MR. ZOLLER: Good morning, Your Honor. Michael Zoller from Pashman, Stein, Walder, Hayden on behalf of the plaintiff, Richard Rivera.
MS. BAUKNIGHT: Good morning, Your Honor. April Bauknight on behalf of the Office of the County Counsel for the Union County Prosecutor's Office.
MR. VARADY: Your Honor, Robert Varady for the intervenor, City of Elizabeth.
MS. DIPALO: Christina DiPalo, also for the intervenor, City of Elizabeth.
THE COURT: Okay. All right. This is an open public meeting's -- I'm sorry, Open Public Records Act case in which the plaintiff, Rivera, seeks to have the internal affairs report and I assume the investigation, not just -- not just the "report", but all the investigation materials.
Internal affairs investigations have by

custom and internal rule been -- been private for purposes of allowing the airing without fear of complaints. Over the decades, there has been some suspicion that inter -- internal affair reports are whitewashed and that's why there's been an effort in some parts of the country and state to have civilian review boards, so that people can be assured that it's not just an in-house matter for the police to sort of, perhaps, sweep under the rug.
There is certainly a justification for a level of secrecy to protect people who -- who would be putting themselves in jeopardy depending on how they -- how they were to testify. So, that's a justification for normally keeping these things private. However, I'm not aware of any case that says in absolutely all circumstances an internal affairs reports and investigations have to be private. In fact, the, as I understand the Attorney General's regulations, internal regulations say we can't release these reports absent a court order. Well, that's what we're here for, a court order.
So, that raises the question of, you know, could the Prosecutor's Office or the City of Elizabeth who opposes this release, could -- could they have done -- released it in response to this report or do they

have to wait to have the court determine that it should be released or perhaps they could have signed a consent order allowing the court to make the decision. Because what's unusual about this case is both the Prosecutor's Office and the City of Elizabeth made public statements about this and certainly it's, I think it's, you know, not contested that as a result of these investigations action was -- was taken.

So, that's where we are. And please tell me, does anybody know of a case that says under no circumstances can an internal affairs report investigation be released? Counsel, sit -- please sit. Thank you.

MR. VARADY: Judge, I'm not aware of any such case, but recently as we put in our brief in the appendix, the -- the trend is still to err on the side of confidentiality.

THE COURT: Well, the trend, I mean, every case is different, Mr. Varady. And here you have a case where the City of Elizabeth people, I think it was Mr. Holzapfel, you know, they made public announcements about this and as acting prosecutor, you know, made a public, a lengthy public statement. And so, that's -- perhaps that's good, but why then shouldn't -- shouldn't the internal affairs report on which these

public statements were made be public? It's sort of -- I don't want to say -- use the word waiver, but it's akin to that.

MR. VARADY: Well, it's not a waiver, Judge. The -- the -- it -- it -- it --

THE COURT: By saying it's not a waiver, it's not a waiver?

MR. VARADY: In these investigations, one of the -- one of the things you have to be careful of is jeopardizing people's --

THE COURT: Of course --

MR. VARADY: -- identity.

THE COURT: Of course, that's true.

MR. VARADY: For instance, this -- in the police department, we -- we have a chain of command.

THE COURT: Somebody -- somebody is asked to tell the truth about something and -- and they put their -- their perhaps promotion or even jobs in jeopardy. I appreciate it.

MR. VARADY: Or -- or -- or in this case, you had civilian employees of the police department --

THE COURT: Same thing.

MR. VARADY: -- who were asked to cooperate, who were assured by the Union County Prosecutor's Office of the confidentiality of their statements and

-- and whatever other evidence that they may -- may bring forward. Here, I think the -- the application is affected by what happened in November of 2019 when the Prosecutor's Office issued a report in regard to the concerns that were raised by citizens, by groups, an 11-page report. My understanding of the application is that Mr. Rivera, either in his status as a police liability expert --

THE COURT: It doesn't have to be a status. He doesn't have to have a status. He's a citizen.

MR. VARADY: No, well, yeah, or as a citizen has -- has an interest in finding out various issues that deal with police departments. In this case it had to do with racial discrimination and sexual harassment.

On November 6, 2019, the -- the Attorney General through the Union County Prosecutor's Office issued an 11-page report addressing those concerns and found the -- they did an oversight. They found that in regard to the internal --

THE COURT: How -- how does it -- how do we know that's not a whitewash? In other words, how do -- how do we know --

MR. VARADY: Because --

THE COURT: -- I mean, well, okay, we -- we -- we assure you members of the public that we took

action based upon the facts that we uncovered and therefore it's over. And the person, the most responsible person for these dastardly communications, both sexist and racist in nature, we took care of that. He's not here anymore. So, here -- the problem is, see --

MR. VARADY: That -- that's not what they said though. No, that's not what -- see --

THE COURT: Well, the problem is whatever -- whatever those reports from the prosecutor said and however the City of Elizabeth responded to those reports. Why should -- why should -- why shouldn't the citizens say, okay, let's -- let's check and see if that -- if that -- if those are bona fide?

MR. VARADY: Well, well, well, let's back up. One, it's not reports. It -- there was a specific complaint against the then police director that he used misogynistic and racial slurs. That was the investigation. That was -- that was the investigation. There wasn't any investigation in regard to promotional discrimination in the Elizabeth Police Department, racial discrimination by police officers --

THE COURT: That -- that's why it's not a personnel matter.

MR. VARADY: Sure, there's a personnel

matter.
THE COURT: Well, I mean, you just said it wasn't.
MR. VARADY: No, it -- it --
THE COURT: You -- you just went through the vacation, pension, sick time -- that -- those are the personnel matters that normally would be -- would be closed documents.
MR. VARADY: Cosgrove was an employee of the City of Elizabeth. There was a complaint raised against him which was investigated. It was kicked back to the city to say act with administratively within the purview of your harassment, anti-harassment policies, which they did. They had Cosgrove resign. That's a personnel matter. That's a hiring, firing, that -- that's --
THE COURT: It's just like you said about the waiver, you know. Judge, it's not a waiver. Just by saying it, doesn't mean it's true.
MR. VARADY: Well, I'm not just saying it.
THE COURT: Yes, you are.
MR. VARADY: No, I'm not just saying --
THE COURT: You're just saying it's not a personnel matter. It's not a --
MR. VARADY: It is a person --

THE COURT: -- it -- it --
MR. VARADY: -- it -- it dealt with the status of Jim Cosgrove as to whether or not he was going to be employed --
THE COURT: Well, you seem to know him. See, I don't know anything about the guy.
MR. VARADY: Well, I've represented the city for -- since 1993 --
THE COURT: Yeah.
MR. VARADY: -- and it's police department. So, I got to know a few people in this --
THE COURT: So, you've been speaking for this apparently covert racist and -- and sexist --
MR. VARADY: Well --
THE COURT: -- person for all these years, not knowing, I'm sure.
MR. VARADY: Well -- well, I -- to -- to answer that, Judge.
THE COURT: Not knowing.
MR. VARADY: To an --
THE COURT: If you knew it, you'd have straightened it out.
MR. VARADY: To answer that, you know, I'll tell you this, since 1993, the City of Elizabeth has never been held liable by a jury verdict, they never

lost a summary judgment motion in regard to a Monell claim dealing --

THE COURT: All right. This is outside the preview of this.

MR. VARADY: No, it's not.

THE COURT: It -- it -- yes, it is. Yes, it is. Okay? Let's focus on the -- on the issues which is the -- both the city and the prosecutor's office made very public statements in response to complaints. The applicant here, who's a citizen, wants to see what that's based on. And since you've already made, essentially, the final conclusion public, why shouldn't, with the exception of names being deleted and the Court reviewing for the protection of the individuals who testified or may have provided information, why shouldn't that information be made public?

MS. BAUKNIGHT: If I may, Your Honor.

THE COURT: Okay. Ms. Bauknight, Mr. Varady stole the floor. You're --

MS. BAUKNIGHT: It's okay.

THE COURT: -- you're the principal defendant here, but he -- he --

MS. BAUKNIGHT: It's okay, Your Honor.

THE COURT: He's intervened and he wants to

speak for City.

MS. BAUKNIGHT: I've -- I've been known him long enough, Your Honor. So, the -- as it relates to case law, it's the City of Newark versus The Ethel P. Lodge (phonetic). The Prosecutor's Office is going to be pulling up this -- the actual citation for me momentarily, Your Honor.

THE COURT: Wait a minute.

MS. BAUKNIGHT: That seeks to --

THE COURT: The City of Newark is -- is -- is the --

MS. BAUKNIGHT: Yeah, it's -- it should have been --

THE COURT: No, it's Lodge Number 12 versus the City of New York (sic) --

MS. BAUKNIGHT: Yes, City of Newark.

THE COURT: -- 459, N.J. 458.

MS. BAUKNIGHT: Yes.

THE COURT: I'm well aware of it. In fact, this judge reads old cases.

MS. BAUKNIGHT: Yes. I'm confident that you do, Your Honor. And so, in that case, it does speak to specifically internal affairs reports and how those -- those reports should be kept confidential. It talks about the whole process. In this particular case, Your

Honor, with the testimony that was -- that was given by the -- received by the investigators. If anyone sees that, they'll know exactly who it was. It's a very small universe of people who have that type of information. So, even with redacting name, the nature and the content of it will --

THE COURT: Don't you think the judge can --

MS. BAUKNIGHT: -- will elicit all the identities.

THE COURT: -- don't you think the judge can review that and handle that? I'm -- I'm very appreciate of this concept of secrecy of --

MS. BAUKNIGHT: Well --

THE COURT: -- protection of -- protection of people. I'm -- I'm very cognizant of that.

MS. BAUKNIGHT: If I can refer you --

THE COURT: However -- however, again, I -- I think the Court can -- can review those matters and make decisions to -- to protect the -- the individuals including -- including circumstances that might identify the individuals. I -- see, it little bit -- it a little bit baffles me why the prosecutor opposes this with -- with -- with proper redactions of -- of circumstances or names that would identify those persons. I'm a little bit baffled because the

prosecutor's position and the City of Elizabeth's -- look, we investigated, this was bad, we took action. And so, I'm a little bit baffled why the -- the -- why you oppose, you know, getting it all out there.

MS. BAUKNIGHT: I can, hopefully, I can help that a little bit. The reframing is not -- is not a cloak of secrecy, Your Honor. It's protecting the individuals who have reported the misconduct, so that in the future when there's conduct before, it won't have chilling effect and people will still decide to come forward and present whatever testimony, all of it, to the Prosecutor's Office when they're doing an investigation. And this particular instance, the prosecutor's promised the -- those who testified, the witnesses, anonymity. And so, to release this now would be violating that trust that was established for them to open up.

THE COURT: Well, you're not -- you're not -- you're not dealing with the -- what I proposed, which is that the matter be submitted -- the matters, the reports and investigation be submitted to the Court to protect those items and the Court can make the deletions and that way everybody gets what they need under -- look, there's a public policy that -- that these -- these type documents, government documents

should be released.
Now, there is a protection, and I appreciate it, I understand it, for internal affairs reports, but, you know, the -- the State history is not pure on -- on these internal affairs reports. We had State Police for a long time saying, we've investigated all these alleges against the State Police about driving while black. We -- we've investigated that. It's nothing, nothing to it. Oh, years go by, little by little, information comes out. So, I'm thinking that, you know, with the protection of the Court reviewing these matters with an eye, the Court with an eye towards making sure witnesses names are protected including by circumstance, not just the names, but the circumstance by which they're -- they could well be identified, I think everybody's getting -- getting what they should get.
MS. BAUKNIGHT: Your Honor, we -- the Prosecutor's Office will certainly consent to an in camera review by Your Honor.
THE COURT: Well, don't say you'll consent to it, just -- just say, you know, you understand what I'm saying.
MS. BAUKNIGHT: No, that's -- that's fine. We -- we have no problem with an in camera review, but

I will just want to bring something to the Court's attention that this is not -- this is not them suing the -- the Prosecutor's Office for an -- an undue investigation or something or the City of Elizabeth for similar reasons, or the -- or Cosgrove himself. This is an OPRA case, so there's not litigation surrounding it yet. This is just, you know, an -- an attempt to find information out, whatever that information may be or may not even exist in there.
So, in terms of a -- of a court order, the statute that you referenced previously, you know, with the -- with the internal affairs reports, the court order contemplated by that regulation is simply if I'm suing so and so and then I have a court order on that instance.
THE COURT: Oh, I don't know that it limits it to that. It's the -- the -- this -- look, the Open Public Records Act is a really important legislative adopted, signed by the Governor that these -- that public records should be maintained -- should be offered to the public, absent particular circumstances. And the circumstances here are the protections that we've talked about, which is internal affairs reports and investigations normally, normally should be kept privately.

But there are circumstances -- and I know Mr. Varady doesn't like the term waiver, but it -- it doesn't look fair that, okay, trust us, trust us. Here we've had a police director who's writing emails that are horrendous and now we've -- we've -- we've investigated, trust us, he's gone. That -- that doesn't assure to me, a citizen read, that everything's okay now. It could. Maybe -- maybe it will. Who knows, maybe you match up what the internal investigation reports and -- and whatever facts -- facts are revealed and you match that up with the public statements if both the City and -- and the Prosecutor's. God, what a great job. They -- they took action. But maybe not and that's what the citizens are entitled to know, I think.

Let's hear from counsel for the applicant.

MR. ZOLLER: I think you're pretty spot on, Your Honor.

THE COURT: Spot on, a rare, a rare occasion.

MR. ZOLLER: That's -- I think you're right.

THE COURT: And by the way, when I'm doing this argument bit, this is just rhetoric. You know, I'm just back and forth. It doesn't mean I've decided the matter. So, make sure you're -- and also, just throw this in.

MR. ZOLLER: Yeah.

THE COURT: If they're not able to release materials like this without a court order, why should you be entitled to attorney fees?

MR. ZOLLER: Sure. I -- I -- one, I don't think a court order is required. I think the prosecutor's office under the attorney general's policy has the ability to release these records if they deem it fit, which based on all the circumstances here --

THE COURT: Well, what -- what -- there's two -- I don't have it in front of me, maybe I do. One was a court order.

MR. ZOLLER: Right. There -- that's one of the -- that can happen.

THE COURT: And what's the other one? Oh, consent of the prosecutor or law enforcement executive.

MR. ZOLLER: Correct. So --

THE COURT: Okay. So, they could have consented, you said.

MR. ZOLLER: And as I understand it, the prosecutor's office is basically in charge of internal affairs --

THE COURT: They could have said that. All right.

MR. ZOLLER: -- division now. So, they could

have --
THE COURT: That's true.
MR. ZOLLER: -- they could have released it.
THE COURT: That's true.
MR. ZOLLER: The court order is the other way. This is OPRA litigation now, so an order from Your Honor is a court order that would qualify for that as well. It's essential what we're seeking here is an order for them to release it because they won't do it on their own. So, and as Your Honor has said, this isn't a personnel matter, it's an internal affairs investigation.
THE COURT: Well, I mean, that's -- that's contested by Mr. Varady.
MR. ZOLLER: Well, yes. I --
THE COURT: He -- he doesn't -- and I -- and I -- look, that was well briefed by you. Okay? And because it's -- it's an exclusion from the OPRA law, so I -- but I -- I tend to agree with your position on that. This is not about Mr. Cosgrove's vacation time. You know the history is so interesting, but I don't think it's fair to give my coloration of the history of the City of Elizabeth Police Department, so I won't -- I won't be factoring that in, but Cosgrove was brought in for a particular reason to straighten out some

problems known as the brotherhood.
MR. ZOLLER: And I think --
THE COURT: And so, you know, this -- this -- this, certainly, mark at the end of his career doesn't necessarily despoil all of the good work that he may have been doing. Any gate, that's just history, that's hearsay, it's stuff that I think I know, but that's not part of the case. The part -- the key to this decision is complaints were made leading to this matter of the racist and sexist aura that apparently were documented ultimately by emails.
(Counsels conferring)
THE COURT: Boy, boy, that sounds pretty bad that somebody would actually put this in writing. Somehow people think that, you know, if you twitter something, it's not really writing.
So, it's hard for me to see this as a, you know, personnel -- we're making a personnel matter with respect to Mr. Cosgrove's, you know, entitlement to benefits or whatever. I kind of -- I -- I'm in line with your thinking on that, but very important is that we -- we protect the individuals who had the -- had the courage to go forward and say, look, I don't care what his position is, this is what happened.
MR. ZOLLER: Which we, plaintiff, totally

agrees with and that's why his request said, I understand there might be some redactable materials, witness --

THE COURT: Okay.

MR. ZOLLER: -- and identifying information. So, his request contemplated that and the prosecutor's office still denied it. So, it was never -- he's never been trying to get everything to -- he doesn't want -- he doesn't care about who the complainants are. He doesn't want identifying information. This is just about the facts as it relates to former director Cosgrove, not the people who made the allegations. And the -- the arguments that it would cause chilling effects in the future, it's really just pure speculation because there's no --

THE COURT: No, it's not speculation. That's a good argument, but that's why it has to be really scrutinized carefully to not identify people including by, as I said a couple time, not just their names, but the circumstances --

MR. ZOLLER: Right.

THE COURT: -- it -- it could be, it could be. You know, I haven't seen the materials. I assume -- I assume there's a report and then there's all this factual investigation. Okay? It could be that none of

the factual investigation needs to be public. The report itself may be public. We have to check that for any circumstantial or identification for individuals because we're -- the goal is to protect the process, but not allow the process to be covered up, if you will. So, I think that's where I'm going.

MR. ZOLLER: Which that's what plaintiff agree with, Your Honor. It's fine with the Court reviewing it.

THE COURT: Okay. Thank you.

MR. VARADY: Judge, you -- you're saying under the OPRA statute, you believe that this report is --

THE COURT: I'm not -- I'm not going to reach the common law. Okay?

MR. VARADY: Okay. That's -- okay.

THE COURT: I'm not going to say it one way or the other in the common law.

MR. VARADY: If --

THE COURT: The common law was there, but it was always -- the reason it was -- look, I'm old enough to remember before there was an OPRA --

MR. VARADY: Right.

THE COURT: -- and the common law was routinely, routinely ignored and there was no access

and attorney, you know, attorney fees for the applicant, so it was routinely ignored. I -- I'm not -- in my decision, I'm not going to deal with the common law. Okay?

MR. VARADY: Okay. I would just point out two unpublished cases that we --

THE COURT: I don't read the published case. I'm not bound by them. I've got enough --

MR. VARADY: Well, but you --

THE COURT: I've got enough law. Okay? You -- you -- you've submitted your --

MR. VARADY: Okay.

THE COURT: -- unpublished cases.

MR. VARADY: I -- I -- but the last think I would like to emphasize again is that the concern in regard to what the Court has raised about the police department investigations. That was all -- that was not part of the Cosgrove investigation subsequent to the Cosgrove investigation, the Union County Prosecutor's Office under the auspices of the attorney general, did an audit of the Elizabeth Police Department which addressed the concerns that were -- were raised in plaintiff's papers. And those concerns were, one, hiring practices which they found to be in accordance with the law and not racially or sexually

prejudicial. Number two, promotional practices which they found to be --

THE COURT: Why is what you're saying relevant? They -- they've -- this is an application for the prosecutor's file --

MR. VARADY: Right.

THE COURT: -- not the City of Elizabeth's file.

MR. VARADY: Well, we -- we -- we have an interest it.

THE COURT: You do have an interest, but -- but it obviously was a -- the prosecutor's investigation was about the City of Elizabeth.

MR. VARADY: No, it wasn't. It was about Jim Cosgrove.

THE COURT: Okay. Well --

MR. VARADY: That -- that --

THE COURT: -- since he was the director of the police, I think it's about the City of Elizabeth.

MR. VARADY: No, it -- it -- it was -- it was a --

THE COURT: Listen --

MR. VARADY: It was a complaint.

THE COURT: -- here's what we're doing. We're doing. Here's what we're doing. This is --

MR. VARADY: Well, can I just finish?
THE COURT: No, you can't because this is an applicant -- because you're off point. This is an application for the prosecutor's investigation and report and so whatever the Elizabeth -- it's not being asked for. Okay? You want to produce it, maybe -- maybe it will colorate --
MR. VARADY: But that's where you misunderstand me. I'm not saying anything from Elizabeth. This came from the prosecutor's office on November 11th, 2019.
THE COURT: That's what the application's for --
MR. VARADY: No, it's --
THE COURT: -- nothing else.
MR. VARADY: This -- this was already -- Exhibit F. It was already published.
THE COURT: I'm not sure that's the case. If it was already published, great. I'll -- I'll get to check it and see it -- match it up with what the Assistant Prosecutor Ruotola did, a public statement, put it on the internet. This -- this is what I'm concerned about in this case, is the prosecutor can selectively -- I hope they didn't, but they can -- they could selectively say this is what we found and there's

a ton more.
MR. VARADY: You -- you're -- you're mix -- you're mixing the two things up, Judge. I'm not -- the internal affairs investigation by the prosecutor's office wasn't published. Subsequent to the investigation, there was an audit or of the Elizabeth Police Department.
THE COURT: Is that being requested in this application?
MR. VARADY: The -- the interest posed is that that's what they're saying. They're saying the environment, the hiring practices, the promotional practices, the internal affairs procedure.
THE COURT: Let me find out what counsel wants. Okay?
MR. VARADY: All right.
THE COURT: What is it, you've applied for? I thought you applied for the prosecutor's file.
MR. ZOLLER: Correct. This request is about --
THE COURT: Is there anything else?
MR. ZOLLER: -- the investigation into Jim Cosgrove and the report there.
THE COURT: Okay. It's just -- just what's in the prosecutor's hands; right?

MR. ZOLLER: The -- the IA investigation of --
THE COURT: You're not asking for the City of Elizabeth's audit post prosecutor investigation. Am I right?
MR. ZOLLER: No.
THE COURT: Correct?
MR. ZOLLER: Correct, Your Honor.
THE COURT: Okay. So, what are we talking about?
MR. VARADY: Well, it wasn't the City of Elizabeth's audit, Judge.
THE COURT: It wasn't what?
MR. VARADY: It wasn't the City of Elizabeth's audit. It was a report by the prosecutor's office through the attorney general.
THE COURT: I want to see everything that the prosecutor has produced pursuant to the investigation of -- of Mr. Cosgrove. And that will be produced -- well, let me just read this properly. Just give me one second, please.
Okay. All right. This is an Open Public Records Act case brought by an individual seeking the release of an internal affairs report investigation done by the Union County Prosecutor's Office,

specifically pertaining to the leadership of the Elizabeth Police Department. It is certainly true that invest -- internal affairs investigations of this type are normally not made public under the theory that investigations should be free to explore complaints and issues and witnesses would not be intimidated by a fear that thing that are said, that are made -- that ultimately are made public, could subject them to harm. At the same time, it might be said that there's always been a fear that serious matters are covered up by the secrecy with which internal affair investigations have been cloaked.
I'm not aware of any binding case law that absolutely prohibits the release of internal affairs investigation by court order. And I'll just cite to O'Shea versus Township of West Milford, 410 N.J. Super. 371, an opinion by Appellate Division Kestin which isn't exactly pertaining to this type report, but it's very close. Those are a re -- use of force reports, as I recall, which are similar. And I think the theme of that case guides the Court.
In fact, the Attorney General guidelines for internal affairs report materials, indicate that a release may be made by a court order. That's suggest that in some circumstances, a court may view that an

internal affairs investigation should be made public in line with the thrust of the Open Public Records Act and common law access to public records.

The unusual and ironic aspect of the application before the Court is that the Prosecutor's Office and the City of Elizabeth have publicly and openly taken -- made statements that direct action to deal with what had been established by the internal affairs investigation had been taken.

The allegations considered by the Prosecutor's Office where there's a particular leader or leaders of the Elizabeth Police report -- I'm sorry, the allegations considered by the Prosecutor's Office was whether there had been a particular leader or leaders in the Elizabeth Police Department engaging in overtly racist and sexist tendencies. Both the Prosecutor's Office and the City of Elizabeth have publicly affirmed that those allegations were based in fact and one of the particular individuals involved in the inappropriate tendencies is no longer with the City of police -- City of Elizabeth Police Department as a result.

The acting prosecutor issued a rather lengthy report about the prosecutor's investigation and findings. The City of Elizabeth publicly announced

corrective action. Therefore, the normal reasons for keeping the internal affairs reports secret are as valid -- are not as valid as they would otherwise be in a routine case. The Prosecutor's Office and the City of Elizabeth assert that the internal affairs reported -- report investigation are personnel matters and therefore, exempt from being made public. I reject this argument. This is not about someone's pension, abuse of sick-leave, vacation accumulation and the like. This investigation involved a matter of extraordinary public interest as acknowledged by the city and the prosecutor when they made public comments following the conclusions of the internal affairs investigation.

There are certain legitimate concerns raised by individuals who testified or provided information to the investigation. Those individuals have a right to be free from retribution or intimidation of any kind. Therefore, all materials connected with the internal affairs investigation are to be presented to the Court for in camera inspection to protect individuals whose names would be revealed, not only by specific, but by circumstance. There's no need for individuals to be -- to be identified or fear that they will be identified by the circumstances of any statements that were made.

Certainly, the intention of the Court going into the in camera review, that the thrust of the investigation will be publicly disclosed pursuant to this application under the Open Public Records Act. However, it will be the Court's obligation to attempt to protect those individuals who could unnecessarily be at risk by public disclosure.

The next issue is attorney fees for the applicant counsel. One aspect of that is the stated policy that internal affairs investigations cannot be released without a court order. Counsel points out that in certain circumstances the attorney general or someone designated by him could make a decision to release it. On the other hand, it could be said that the Prosecutor's Office and the City of Elizabeth could well have agreed to public disclosure given their public statements about what the internal investigation found by signing a consent order or even unilaterally deciding it was okay. That aspect may impact the attorney fee award.

So, I'm going to require the -- all aspects of the Union County Prosecutor's Office investigation be provided to the Court in camera for review. Also, I would like to be briefed by counsel and have an affidavit of services and the question of whether

attorney fees are mandatory or appropriate in this case at all. I'm going to ask that -- let's -- I don't know. I'll set, like, within 14 days, the material must be produced. It's going to take me a while, I assume, to review the matter, and so, you can submit your briefs, let's say, within 30 days on the attorney fee application.

I'm going to ask Ms. Bauknight to prepare a formal order implementing these things, circulate among counsel and we will go from there. All right. Thank you very much.

MR. VARADY: Thank you, Judge.

MR. ZOLLER: Thank you, Your Honor.

MS. BAUKNIGHT: Thank --

(Proceedings concluded at 9:36 a.m.)

C E R T I F I C A T I O N

I, Ellen Hall, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the matter of RICHARD RIVERA v. UNION COUNTY PROSECUTOR'S OFFICE, ET AL. heard in the Union County Superior Court, Law Division, Civil Part, January 24, 2020, CourtSmart, Index No. 9:04:41 to 9:36:27, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

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Agency — Date

ROBERT E. BARRY, ESQ.
UNION COUNTY COUNSEL
Department of Law
Administration Building
10 Elizabethtown Plaza
Elizabeth, New Jersey 07207
(908) 527-4250
Attorney for Defendants,
Union County Prosecutor's Office and John Esmerado

By: April C. Bauknight, Assistant County Counsel
ID#: 028982004

RICHARD RIVERA,

Plaintiff,

vs.

UNION COUNTY PROSECUTOR'S OFFICE and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY
DOCKET NO.: UNN-L-2954-19

CIVIL ACTION

ORDER

This matter having been brought before the Court by application of CJ Griffin, Esq, of Pashman Stein Walder Hayden, P.C., attorneys for Plaintiff, for an Order Granting Plaintiff's Order to Show Cause.

IT IS on this 6 day of Feb 2020,

ORDERED that Defendants shall provide to the court the complete set of investigation materials for the investigation that was conducted into the conduct of former Elizabeth Police Director James Cosgrove to be reviewed *in camera* and under seal within ~~fourteen (14)~~ 7 days of the signed order; and it is

FURTHER ORDERED that the parties are to submit briefs on the issue of the court

awarding attorney's fees within thirty (30) days of this ordered being signed; and it is

FURTHER ORDERED that a copy of the executed Order be forwarded to all parties of record within 7 days of the date hereof.

This Motion was: .

✓ Opposed _____ Unopposed

Hon. James Hely, J.S.C.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2573-19T3

RICHARD RIVERA,

Plaintiff-Respondent,

v.

UNION COUNTY PROSECUTOR'S OFFICE, and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office,

Defendants-Appellants,

and

CITY OF ELIZABETH,

Intervenor-Appellant.

Argued telephonically May 18, 2020 –
Decided June 19, 2020

Before Judges Geiger and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2954-19.

April C. Bauknight, Assistant County Counsel, argued the cause for appellants Union County Prosecutor's Office and John Esmerado (Robert E. Barry, Union County Counsel, attorney; April C. Bauknight, on the briefs).

CJ Griffin argued the cause for respondent (Pashman, Stein, Walder & Hayden, PC, attorneys; CJ Griffin, on the brief).

Robert F. Varady argued the cause for intervenor-appellant City of Elizabeth (LaCorte, Bundy, Varady & Kinsella, attorneys; Robert F. Varady, of counsel; Christina M. DiPalo, on the brief).

PER CURIAM

The Union County Prosecutor's Office (UCPO) conducted an internal affairs (IA) investigation of former Elizabeth Police Department (EPD) Director James Cosgrove's alleged workplace misconduct directed at members of the EPD. Plaintiff Richard Rivera[1] requested access to the IA investigation report pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. The UCPO denied his request.

[1] Plaintiff "is a retired New Jersey municipal police officer, private consultant, civil rights advocate, and expert witness in police practices and policies." Since 2008, he has "volunteer[ed] his time and resources to the Latino Leadership Alliance of New Jersey" and co-chairs its Civil Rights Protection Project.

Plaintiff filed this action against defendants UCPO and John Esmerado, in his official capacity as Records Custodian for the UCPO, demanding access to the IA investigation report. By leave granted, defendants and intervenor City of Elizabeth (Elizabeth) (collectively appellants), appeal from a February 6, 2020 Law Division order requiring the UCPO and Esmerado to produce "the complete set of investigation materials that was conducted into the conduct of former Elizabeth Police Director James Cosgrove" for in camera review.

I.

We summarize the pertinent facts. In February 2019, EPD employees filed an internal complaint alleging Cosgrove used racist and sexist epithets when referring to his staff. After conducting a two-month IA investigation of Cosgrove's conduct, the UCPO sustained the allegations against Cosgrove, finding he violated Elizabeth's anti-discrimination and anti-harassment policies.

In April 2019, the UCPO wrote to the complainants' attorney notifying him that "a thorough investigation" revealed that "Cosgrove used derogatory terms in the workplace when speaking about city employees." The attorney turned the letter over to the media. On April 26, 2019, Attorney General Gurbir S. Grewal issued a press release calling for Cosgrove's immediate resignation. Attorney General Grewal noted that the IA investigation "concluded that, over

the course of many years, Director Cosgrove described his staff using derogatory terms, including racist and misogynistic slurs." The media gave substantial coverage to the story. Cosgrove resigned shortly thereafter.

In July 2019, plaintiff submitted an OPRA and common law right of access request to the UCPO, seeking the following material with appropriate redactions: (1) "the report regarding [the EPD's IA] issues and claims of racism and misogyny"; and (2) "all [IA] reports regarding" Cosgrove.

The UCPO issued a July 10, 2019 letter denying plaintiff's request for the documents. As to the requested EPD report, the UCPO advised that "in general, . . . no such report exists." As to Cosgrove-related IA reports, the UCPO explained that such material is a "personnel and/or internal affairs record[]," which is "exempt from disclosure under OPRA" and remains confidential pursuant to the Internal Affairs Policy & Procedures (IAPP) promulgated by the Attorney General,[2] absent "a court order or consent of the Prosecutor or Law Enforcement Executive."

[2] The IAPP is issued by the Attorney General through the Division of Criminal Justice and has been periodically updated, most recently in December 2019. While the 2017 version was in effect when plaintiff filed this action, we cite to the December 2019 version because the revisions do not affect our analysis.

The UCPO also denied plaintiff's common law request, asserting that its "interest[s] in maintaining confidentiality significantly outweigh [plaintiff's] interests in disclosure." The UCPO explained that releasing the IA reports would have a chilling effect on individuals reporting wrongdoing. It noted that "remedial measures" had been taken, which included Cosgrove's resignation and requiring the EPD "to be retrained on issues of implicit bias and workplace harassment."

On August 21, 2019, plaintiff filed this action against the UCPO and Esmerado alleging violations of OPRA (count one) and the common law right of access (count two). The court issued an order to show cause (OTSC) directing defendants to explain why judgment should not be entered granting plaintiff access to the records and awarding attorney's fees. Elizabeth moved to intervene, which was granted.

During oral argument before the trial court, plaintiff's counsel acknowledged the need to redact information identifying the complainants. Counsel stated that plaintiff "doesn't care about who the complainants are. He doesn't want identifying information. This is just about the facts as it relates to former director Cosgrove, not the people who made the allegations."

The court issued an oral decision and February 6, 2020 order partially granting plaintiff's OPRA application, requiring defendants to produce "the complete set of investigation materials for the investigation that was conducted into the conduct of . . . Cosgrove to be reviewed in camera and under seal."

The court acknowledged the competing interests of confidentiality and transparency. It noted that "[t]here is certainly a justification for a level of secrecy to protect people who . . . would be putting themselves in jeopardy depending on how they . . . were to testify. So, that's a justification for normally keeping these things private." The court recognized that "[IA] investigations of this type are normally not made public under the theory that investigations should be free to explore complaints and issues and witnesses" without the possibility of public disclosure that "could subject them to harm." But the court also expressed "fear that serious matters are covered up by the secrecy with which [IA] investigations have been cloaked."

During oral argument before the trial court, a colloquy ensued regarding whether any public announcements about the IA investigation were "akin" to a waiver of the right to confidentiality. The trial court did not find appellants had waived the right to confidentiality but noted the UCPO and Elizabeth had "publicly affirmed that [the] allegations were based in fact and one of the

particular individuals involved in the inappropriate tendencies is no longer with the [EPD] as a result." The court concluded that the acting prosecutor's report about the investigation and findings and Elizabeth's "publicly announced corrective action" rendered "the normal reasons for keeping the [IA] reports secret . . . not as valid as they would otherwise be in a routine case."

The court stated it was unaware of any binding precedent prohibiting release of IA materials and noted the IAPP expressly permits the release of such material by court order.

In rejecting appellants' argument that OPRA's personnel record exemption applies, the court reasoned the matter at issue "is not about someone's pension, abuse of sick-leave, vacation accumulation and the like" but rather one of "extraordinary public interest."

The court recognized the risk that complainants and witnesses could face retribution or intimidation if their identities were detected. The Court acknowledged its "obligation to attempt to protect those individuals who could unnecessarily be at risk by public disclosure."

Ultimately, the court required that "all aspects" of the UCPO's investigation be provided for in camera review under seal. To protect confidentiality, the court stated it would redact "not just the names, but the

circumstances by which" the complainants and witnesses "could well be identified."

The court did not reach plaintiff's common law right of access claim and reserved judgment on plaintiff's application for an award of counsel fees. The court subsequently denied defendant's motion to stay the order and plaintiff's motion for reconsideration as to its common law right of access claim.

We granted the UCPO leave to appeal, stayed the trial court's order, and permitted Elizabeth to intervene in the appeal.

On appeal, the UCPO raises the following points:

> I. THE TRIAL COURT ERRED IN CONCLUDING THAT [IA] MATERIAL ARE NOT PERSONNEL RECORDS, AND THEREFORE NOT WITHIN AN EXEMPTION WITHIN N.J.S.A. 47:1A-10.
>
> II. THE ATTORNEY GENERAL'S [IAPP] REINFORCE THE LONG-RECOGNIZED CONFIDENTIALITY OF [IA] RECORDS.
>
> III. THE TRIAL COURT MISCHARACTERIZED THE HOLDING OF O'SHEA[3] BY INFERRING THAT A USE OF FORCE REPORT IS SIMILAR TO AN [IA] REPORT.
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> IV. THE TRIAL COURT PREMATURELY DISCUSSED ATTORNEY'S FEES THEREBY SIGNALING A DECISION WAS ALREADY MADE.

[3] O'Shea v. Twp. of W. Milford, 410 N.J. Super. 371 (App. Div. 2009).

> V. THE DISCLOSURE OF [IA] MATERIAL WILL ERADICATE THE STATE'S PUBLIC POLICY TO MAINTAIN THE CONFIDENTIALITY OF [IA] AND SET PRECEDENT WHICH WILL STRONGLY DEVIATE FROM LEGISLATIVE INTENT.

In turn, Elizabeth raises the following additional points:

> I. THE TRIAL COURT ERRONEOUSLY GRANTED THE PLAINTIFF'S [OTSC] AS THE UNION COUNTY PROSECUTOR'S [IA] REPORT RELATING TO THE INVESTIGATION OF JAMES COSGROVE IS CONFIDENTIAL AND CANNOT BE RELEASED UNDER OPRA.
>
> II. THE TRIAL COURT ERRONEOUSLY GRANTED THE PLAINTIFF'S [OTSC] AS THE UNION COUNTY PROSECUTOR'S [IA] REPORT RELATING TO THE INVESTIGATION OF JAMES COSGROVE IS EXEMPT FROM OPRA AS IT CONSTITUTES A PERSONNEL RECORD.
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> III. THE TRIAL COURT'S DECISION IS NOT SUPPORTED BY THE RECORD IN THIS CASE.

II.

We begin our analysis by briefly reviewing OPRA's purpose, requirements, and application. The Legislature enacted OPRA "to promote transparency in the operation of government." Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 541 (2012) (citing Burnett v. Cty. of Bergen, 198 N.J. 408, 414 (2009)). "[T]o ensure an informed citizenry and to minimize the evils inherent in a secluded process," OPRA provides the public with broad access to

"government records . . . unless an exemption applies." In re N.J. Firemen's Ass'n Obligation, 230 N.J. 258, 276 (2017) (citations omitted). To fulfill that purpose, N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible . . . by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access . . . shall be construed in favor of the public's right of access." See also N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst, 229 N.J. 541, 555 (2017) (acknowledging this statutory mandate).

"Government record" is broadly defined under OPRA to include any document "made, maintained or kept on file in the course of . . . official business by any officer, commission, agency or authority of the State or of any political subdivision [or] subordinate boards thereof." N.J.S.A. 47:1A-1.1. Notwithstanding OPRA's expansive reach, "the right to disclosure is not unlimited." Kovalcik v. Somerset Cty. Prosecutor's Office, 206 N.J. 581, 588 (2011). N.J.S.A. 47:1A-1.1 expressly excludes twenty-one categories of documents and information from its definition of a government record.

Relevant here, OPRA's broad right to access is limited by "established public-policy exceptions," which declare that "government record[s] shall not include . . . information which is deemed to be confidential." Gilleran v. Twp.

of Bloomfield, 227 N.J. 159, 170 (2016) (second alteration in original) (quoting N.J.S.A. 47:1A-1.1). Such confidential information includes personnel records and grievances. N.J.S.A. 47:1A-1.1, -10.

"OPRA also contains a privacy clause requiring public agencies 'to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]'" L.R. v. Camden City Pub. Sch. Dist., 452 N.J. Super. 56, 80 (App. Div. 2017) (alteration in original) (quoting N.J.S.A. 47:1A-1), aff'd by an equally divided Court, 238 N.J. 547 (2019). Courts consider the following factors when determining whether a government record must be withheld or redacted prior to disclosure under OPRA:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.
>
> [Burnett, 198 N.J. at 427 (quoting Doe v. Poritz, 142 N.J. 1, 88 (1995)).]

Additional provisions exempt government records from public access. Pertinent to this appeal, the statute "exempts from disclosure any information

that is protected by any other state or federal statute, regulation, or executive order." Brennan v. Bergen Cty. Prosecutor's Office, 233 N.J. 330, 338 (2018) (citing N.J.S.A. 47:1A-9(a) (stating that OPRA's provisions "shall not abrogate any exemption of a public record or government record from public access" under "any other statute" or "regulation promulgated under the authority of any statute or Executive Order of the Governor")); see also N.J.S.A. 47:1A-1.

Nevertheless, exemptions from disclosure under OPRA should be construed "narrowly." Asbury Park Press v. Cty. of Monmouth, 406 N.J. Super. 1, 8 (App. Div. 2009). The reasons for non-disclosure "must be specific" and courts should not "accept conclusory and generalized allegations of exemptions." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 162 (App. Div. 2011) (quoting Loigman v. Kimmelman, 102 N.J. 98, 110 (1986)). "The public agency [has] the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6. "To justify non-disclosure, the agency must make a 'clear showing' that one of the law's listed exemptions is applicable." Lyndhurst, 229 N.J. at 555 (quoting Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)).

We undertake de novo review of "determinations about the applicability of OPRA and its exemptions." N.J. Firemen's Ass'n Obligation, 230 N.J. at 273-74 (citations omitted). We also undertake de novo review of trial court decisions concerning access to government records under the common law right of access. Drinker Biddle & Reath LLP v. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011).

III.

A.

The Legislature has declared that personnel records "shall not be considered a government record and shall not be made available for public access," N.J.S.A. 47:1A-10, "unless it falls within one of the statutory" exceptions, Kovalcik, 206 N.J. at 593.

Defendants contend the IA report is a "personnel record" and thus exempt from disclosure, noting it "originated from a specific complaint against [Cosgrove]." The trial court disagreed, concluding the IA reports were unlike typical personnel records such as an employee's pension or sick leave records. We concur with that aspect of the trial court's analysis.

The Attorney General does not consider IA case files and materials to be personnel records. On the contrary, "[p]ersonnel records are separate and

distinct from [IA] investigation records, and [IA] investigative reports shall never be placed in personnel records, nor shall personnel records be co-mingled with [IA] files." IAPP § 9.12.1. This prohibition applies even where the "complaint is sustained, and discipline imposed." Id. at § 9.12.2. Accordingly, the IA materials are not exempt from disclosure as "personnel records."

B.

Plaintiff emphasizes OPRA does not contain a specific reference to the IAPP or enumeration of IA investigation reports as documents that are not government records. However, a literal review of the statute overlooks the depth of the recognized exemptions.

In North Jersey Media Group v. Bergen County Prosecutor's Office, we explained that the available exemptions to disclosure are not limited to "those enumerated as protected categories within the four corners of OPRA" because "N.J.S.A. 47:1A-1 explicitly recognizes that records may be exempt from public access based upon authorities other than the exemptions enumerated within OPRA." 447 N.J. Super. 182, 201-02 (App. Div. 2016). We further explained that "N.J.S.A. 47:1A-9 codifies the Legislature's unambiguous intent that OPRA not abrogate or erode existing exemptions to public access." Id. at 202. This includes any "regulation promulgated under the authority of any statute or

Executive Order of the Governor" and "any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." Ibid. (emphasis omitted) (quoting N.J.S.A. 47:1A-9). We emphasized that "the plain language of the statute as well as judicial precedent make it clear that an exemption is statutorily recognized by OPRA if it is established by any of the authorities enumerated in N.J.S.A. 47:1A-1 or -9." Ibid.

"The Attorney General is the State's chief law enforcement officer [with] the authority to adopt guidelines, directives, and policies that bind police departments throughout the State." Lyndhurst, 229 N.J. at 565. These "guidelines, directives or policies cannot be ignored," O'Shea, 410 N.J. Super. at 383, and "are binding upon local law enforcement agencies," Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 500 (App. Div.), certif. granted, 240 N.J. 7 (2019) (emphasis omitted) (citing O'Shea, 410 N.J. Super. at 383; In re Carroll, 339 N.J. Super. 429, 439, 442-43 (App. Div. 2001)).

We recognize that the IAPP along with other Attorney General guidelines, directives, and policies are not adopted in the same way other agencies adopt administrative rules promulgated under the Administrative Procedure Act

(APA), N.J.S.A. 52:14B-1 to -15. However, the IAPP does not consist of "'administrative rules' as defined in N.J.S.A. 52:14B-2(e)," and "do not require formal promulgation under the [APA]." O'Shea, 410 N.J. Super. at 383; accord Carroll, 339 N.J. Super. at 442-43 (holding that the IAPP was "not required to be promulgated pursuant to the APA" because it "fall[s] within the [APA's] statutory exception for 'statements concerning the internal management or discipline of any agency'" (quoting N.J.S.A. 52:14B-2(e))).

IA investigations by law enforcement agencies fall under the supervision of the Attorney General. N.J.S.A. 52:17B-98. The IAPP was adopted pursuant to the authority granted to the Attorney General by N.J.S.A. 40A:14-181, which states: "Every law enforcement agency . . . shall adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP] . . . ."

The IAPP sets forth the policies, procedures, and best practices that all county and municipal law enforcement agencies are required to follow. IAPP § 1.0.4. See McElwee v. Borough of Fieldsboro, 400 N.J. Super. 388, 395 (App. Div. 2008) (stating that N.J.S.A. 40A:14-181 "requires every law enforcement agency to adopt and implement guidelines consistent with the Attorney General's [IAPP])." A crucial aspect of those policies is the confidentiality of IA investigation case files. With limited exceptions, IA records are accessible

only to IA personnel, the law enforcement agency executive, and the county prosecutor, keeping the number of individuals with access to a minimum. Section 9.6.1 sets forth the following confidentiality requirements:

> The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information. The contents of an internal investigation case file, including the original complaint, shall be retained in the internal affairs function and clearly marked as confidential. The information and records of an internal investigation shall only be released or shared under the following limited circumstances:
>
> > (a) If administrative charges have been brought against an officer and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer before the hearing;
> >
> > (b) If the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal affairs investigation, a copy of the internal investigation reports, may be released to the subject officer, agency or jurisdiction;
> >
> > (c) Upon the request or at the direction of the County Prosecutor or Attorney General; or
> >
> > (d) Upon a court order.

"In addition, the law enforcement [agency's executive officer] may authorize access to a particular file or record for good cause." Id. at § 9.6.2. Such access

should be granted "sparingly, given the purpose of the [IA] process and the nature of many of the allegations against officers." Ibid.

Even Civilian Review Boards have limited access to IA investigations and are subject to strict confidentiality requirements. "Internal investigation case files generally are not releasable to Civilian Review Boards" unless the investigation is "completed or closed," "good cause" is shown, "and the [Board] has in place certain minimum procedural safeguards, as described in Section 9.7.2, to preserve the confidentiality of the requested records and the integrity of the [IA] function, in addition to complying with all other applicable legal requirements." Id. at § 9.7.1.

In turn, Section 9.7.2(b)(1) requires that a Civilian Review Board must meet "in a closed session whenever the content of [IA] records are discussed or testimony or other evidence regarding a specific incident is presented." The Civilian Review Board may not disclose any part of an IA file "to any person who is not a Board member or employee, the law enforcement executive, or a member of the law enforcement agency's [IA] function, except in a final public report appropriately redacted in accordance with instructions from the law enforcement executive." Id. at § 9.7.2(b)(2). Further, "the Civilian Review

Board's final public report . . . may not disclose the personal identity of subject officers, complainants, or witnesses." Id. at § 9.7.2(b)(3).

These comprehensive restrictions are clearly designed to preserve the integrity and confidentiality of all IA investigations.

In accordance with N.J.S.A. 40A:14-181, the UCPO adopted and implemented policies consistent with the IAPP to govern its IA investigations.

The Use of Force Policy issued by the Attorney General "has 'the force of law for police entities.'" Lyndhurst, 229 N.J. at 565 (quoting O'Shea, 410 N.J. Super. at 382). Similar to the Use of Force guidelines examined in Lyndhurst and O'Shea, we conclude the IAPP was created pursuant to such a statutory mandate and has "the force of law in respect of the duties of law enforcement agencies to conform to the requirements" when conducting internal affairs investigations. O'Shea, 410 N.J. Super. at 384.

The trial court noted that the IAPP states that an IA investigation case file may be released by court order. It found that provision "suggest[ed] that in some circumstances, a court may view that an [IA] investigation should be made public" under OPRA and the common law right of access. Although we agree that the court may order the release of an IA investigation case file when

appropriate to do so,[4] IAPP Section 9.6.1(d) does not create an independent substantive basis for release.

Applying these standards, we hold that IA investigation reports and documents are exempt from disclosure under OPRA and reverse the order compelling defendants to produce the complete record of the IA investigation relating to Cosgrove's conduct for in camera review.

The documents plaintiff requested involved internal complaints filed by subordinates against Cosgrove. Accordingly, the resulting IA investigation of Cosgrove's conduct, and potential disciplinary action, "implicate[d] interests beyond those of the parties themselves." Kovalcik, 206 N.J. at 595. Requiring disclosure of such records could well result in far reaching negative impact, impairing the laudable goals of IA investigations.

[4] There may be instances where an IA investigation case file is relevant and probative in the defense of criminal charges or the prosecution of a civil action brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2; or Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14. No such circumstances are present here.

There are many reasons for maintaining confidentiality of the complainants, witnesses, and officers involved in an IA investigation. As we recently explained:

> Disclosure of a complainant's identity could thwart an IA investigation, criminal investigation, or prosecution, or could disclose the name of an informant, and could taint an officer who was wrongfully accused. It could also discourage complainants from coming forward, or encourage unwarranted complaints from people seeking notoriety.[5]
>
> [Fraternal Order of Police, 459 N.J. Super. at 507.]

In addition, disclosure of the complainants, witnesses, and subject officers could: reveal the name and location of inmates and informants, which may

[5] Some of these same concerns mirror the need for confidentiality under the Patient Safety Act, N.J.S.A. 26:2H-12.23 to -12.25. The Legislature found that "[f]ear of sanctions induces health care professionals and organizations to be silent about adverse events, resulting in serious under-reporting." N.J.S.A. 26:2H-12.24(e). It "reasoned that health care professionals and other facility staff are more likely to effectively assess adverse events in a confidential setting, in which an employee need not fear recrimination for disclosing his or her own medical error, or that of a colleague." C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 464 (2014). To achieve that result, the Act provides that "[a]ny documents, materials, or information developed by a health care facility as part a process of self-critical analysis conducted pursuant to [N.J.S.A. 26:2H-12.25(b)] shall not be . . . subject to discovery or admissible as evidence or otherwise disclosed in any civil, criminal, or administrative action or proceeding." N.J.S.A. 26:2H-12.25(g)(1).

subject them to harm; discourage complainants from coming forward because they will not maintain anonymity; and encourage unwarranted complaints to seek notoriety or target an officer for reasons other than wrongdoing.

While we recognize that the trial court intended to redact the names and identifying circumstances to protect the complainants and witnesses from retribution and intimidation, that task would likely prove very difficult, if not impossible. See L.R., 452 N.J. Super. at 90 (recognizing that "[u]nder certain circumstances, even the redaction of all personally identifiable information would not prevent reasonable persons . . . from identifying" an individual); Lyndhurst, 441 N.J. Super. at 111 (noting that "[i]n some cases, in camera review of a Vaughn index[6] may be appropriate, because the release of even a 'detailed Vaughn index' to a requesting party 'may in some cases enable astute parties to divine with great accuracy the names of confidential informers, sources, and the like'" (quoting Loigman, 102 N.J. at 111)). Because the

[6] "A Vaughn index is comprised of affidavits containing a 'relatively detailed' justification for the claim of privilege being asserted for each document. The judge analyzes the index to determine, on a document-by-document basis, whether each such claim of privilege should be accepted or rejected." Paff v. Div. of Law, 412 N.J. Super. 140, 161 n.9 (App. Div. 2010) (citing Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973). The affidavits "ordinarily" omit "excessive reference to the actual language of the document." Vaughn, 484 F.2d at 826-27.

complainants and witnesses are members of the EPD, their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their identity or narrow the field to only a few individuals, even if all personally identifiable information is redacted. Other members of the EPD, as well as Cosgrove himself, could probably deduce who reported the behavior.

We question the adequacy of a redaction process that simply deletes "names and circumstances" while leaving other information that would need to be scrubbed from the records to prevent identification of the complainants and witnesses from the redacted document. The identity of those persons can often be readily determined from context or information that a judge conducting an in camera review may deem innocuous. The ability to identify the complainants and witnesses may well impair their safety and otherwise put them at risk of retribution or intimidation.

In addition, as we have noted, disclosure of the IA investigation would discourage complainants and witnesses from coming forward in the future. Particularly in the context of an IA investigation based on employees of a police department complaining of discriminatory treatment by fellow employees or their superior, the fear that anonymity will not be maintained could lead to

employees remaining silent about misconduct, thereby thwarting IA investigations and resulting corrective and disciplinary action.

The trial court alluded to appellants waiving the right to contest disclosure of the IA investigation file due to the public statements made following the conclusion of the investigation. We find no such waiver.

"Generally, waiver is defined 'as the voluntary and intentional relinquishment of a known and existing right.'" Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 267 (App. Div. 2000) (emphasis omitted) (quoting Williston on Contracts, § 39:14 (Lord ed. 2000)). "[T]here must be a clear act showing the intent to waive the right." Cty. of Morris v. Fauver, 153 N.J. 80, 104 (1998) (citing W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 152 (1958)).

The limited information contained in the statements did not constitute an intentional surrender of the right to assert the IA materials were confidential. The statements did not identify the complainants or witnesses or disclose the details of the internal complaints, the statements of witnesses, or other confidential information. At most, the statements provided confirmation that the investigation substantiated the allegations that Cosgrove had uttered sexually harassing and racist slurs towards EPD employees, and that Cosgrove

should resign. This limited disclosure did not amount to a voluntary and intentional waiver of the confidentiality of the IA investigation.

Finally, we disagree with the trial court's conclusion that "the normal reasons for keeping the [IA] reports secret . . . are not as valid as they would otherwise be" because "[t]he acting prosecutor issued a rather lengthy report about the prosecutor's investigation and findings" and "Elizabeth publicly announced corrective action." The statements made by the UCPO and the Attorney General carefully avoided revealing information that would indirectly identify the complainants and witnesses. The limited information provided did not include the target of the slurs; the specific language used; or the specific date, time, or location of the misconduct. Nor did it describe the circumstances leading up to or following Cosgrove's actions.

Because we hold that the IA investigation file and report are exempt from disclosure under OPRA, we do not reach the issue of attorney's fees.

C.

OPRA contains a separate exemption for grievances. "A government record shall not include the following information which is deemed to be confidential for the purposes of [OPRA]: . . . information generated by or on behalf of public employers or public employees in connection with any sexual

harassment complaint filed with a public employer or with any grievance filed by or against an individual." N.J.S.A. 47:1A-1.1.[7] Appellants argue that disclosure is precluded under this exemption.

The limited record does not contain the internal complaints filed against Cosgrove or any other part of the IA investigation file. Appellants did not move to supplement the record to include those documents by way of confidential supplemental appendix. We are thus unable to review the format of the internal complaints, the relief sought, whether they were filed pursuant to a collective bargaining agreement, how they were presented, or the process the EPD initially undertook when reviewing them. Consequently, we are effectively prevented from determining if the complaints and resulting investigation fall within OPRA's grievance exemption.

[7] We note that the Department of Law and Public Safety adopted a more expansive grievance exception, which precludes OPRA access to any records "specific to an individual employee . . . and relating to or which form the basis of discipline, discharge, promotion, transfer, employee performance, employee evaluation, or other related activities, whether open, closed, or inactive, except for the final agency determination." N.J.A.C. 13:1E-3.2(a)(4). This definition includes an IA investigation file relating to or forming the basis for discipline or discharge based on racially or sexually discriminatory misconduct directed at subordinate employees. We recognize, however, that this regulation applies to the Department of Law and Public Safety, not local law enforcement agencies.

Moreover, appellants have not demonstrated, much less made a "clear showing," that the grievance exemption applies in this matter. Appellants acknowledge that the UCPO's July 2019 denial letter to plaintiff's counsel did not rely upon or even cite OPRA's grievance exemption. See Newark Morning Ledger Co., 423 N.J. Super. at 162 (App. Div. 2011) ("[T]he reasons for withholding documents must be specific. Courts will 'simply no longer accept conclusory and generalized allegations of exemptions.'" (Quoting Loigman, 102 N.J. at 110)). Appellants' briefing to this court likewise fails to adequately address the grievance exemption.[8]

The limited record and appellants' inadequate briefing significantly impedes meaningful appellate review of this issue, which has not been addressed in any published opinion. We therefore decline to address the issue.[9]

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[8] Appellants each cite the grievance exemption a single time in their appellate briefs: The UPCO asserts "while not explicitly stated in its original denial," it denied "[p]laintiff's records request in accordance with N.J.S.A. 47:1A-1.1[] which prohibits the disclosure if records concerning the filing of a grievance against an employee"; Elizabeth merely notes that OPRA's exemptions include "records concerning the filing of a grievance by or against a public employee."

[9] Appellate counsel is required to identify and fully brief any issue raised on appeal. See Sackman v. N.J. Mfrs. Ins. Co., 445 N.J. Super. 278, 298 (App. Div. 2016); State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977). An argument based on conclusory statements is insufficient to warrant appellate review. Nextel of N.Y., Inc. v. Borough of Englewood Cliffs Bd. of Adjustment, 361

IV.

Plaintiff also sought release of the IA reports under the common law right of access. The trial court did not reach this issue.

The common law right of access reaches a broader class of documents than its statutory counterpart. Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995) (citing Atl. City Convention Ctr. Auth. v. S. Jersey Publ'g Co., 135 N.J. 53, 60 (1994)). "To gain access to this broader class of materials, the requestor must make a greater showing than OPRA requires . . . ." Lyndhurst, 229 N.J. at 578. The common law right to access public records hinges on three requirements: "(1) the records must be common-law public documents; (2) the person seeking access must establish an interest in the subject matter of the material; and (3) the citizen's right to access must be balanced against the State's interest in preventing disclosure." Keddie v. Rutgers, 148 N.J. 36, 50 (1997) (citations and internal quotation marks omitted). Furthermore, because the common law right of access to documents is qualified, "one seeking access to such records must 'establish that the balance of its interest in disclosure against

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N.J. Super. 22, 45 (App. Div. 2003) (citing Miller v. Reis, 189 N.J. Super. 437, 441 (App. Div. 1983)). "[A]ny privacy concerns about a disclosure sought pursuant to OPRA or the common law should be explained in detail." Paff v.Ocean Cty. Prosecutor's Office, 235 N.J. 1, 28 (2018).

the public interest in maintaining confidentiality weighs in favor of disclosure.'" Ibid. (quoting Home News v. Dep't of Health, 144 N.J. 446, 454 (1996)).

Here, there is no dispute that the IA documents are common law public records. The items sought are "written memorial[s] . . . made by a public officer, and . . . the officer [is] authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954)). Plaintiff has the requisite interest in the subject matter of the documents "to further a public good." Loigman, 102 N.J. at 104. Accordingly, the critical factor is whether plaintiff's right to the documents outweighs defendants' interest in preventing disclosure. The balancing of the competing interests in disclosure and confidentiality often involves an "exquisite weighing process." Id. at 108 (citation omitted).

Our Supreme Court provided the following non-exhaustive list of factors to consider in balancing the requester's needs against the public agency's interest in confidentiality:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;

> (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Loigman, 102 N.J. at 113.]

"To conduct the careful balancing that each case" requires, courts should "look in particular at the level of detail contained in the materials requested." Lyndhurst, 229 N.J. at 580. "More detailed disclosures" present greater concerns. Ibid. To that end, "courts may perform an in camera inspection of the requested records as they balance the relevant factors," L.R., 452 N.J. Super. at 89 (citing Keddie, 148 N.J. at 53-54), and "are authorized to require the redaction of records to maintain confidentiality," Id. at 90 (citing S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 499 (1991)).

When weighing these competing interests, "administrative regulations bestowing confidentiality upon an otherwise public document, although not dispositive of whether there is a common law right to inspect a public record, should, nevertheless, weigh 'very heavily' in the balancing process, as a determination by the Executive Branch of the importance of confidentiality."

Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 521 (App. Div. 2004) (quoting Home News, 144 N.J. at 455). While not an "administrative rule" subject to the APA, the IAPP has the force of law and is binding on local law enforcement agencies, including the UCPO and EPD. It requires local law enforcement agencies to maintain the confidentiality of IA investigation files.[10]

We acknowledge that the common law right of access remains an independent means to obtain government records, id. at 516, and that "[n]othing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigation records of a law enforcement agency," N.J.S.A. 47:1A-8. Nevertheless, a court may consider OPRA's exemptions "as expressions of legislative policy on the subject of confidentiality," provided they do not "heavily influence the outcome of the analysis" under the common law. Bergen Cty. Improvement Auth., 370 N.J. Super. at 520-21. Thus, a court may consider that IA records are exempt under OPRA when considering the common law right of access to such records.

[10] By analogy, pursuant to N.J.A.C. 13:1E-3.2(a)(4), Department of Law and Public Safety records relating to the discipline or discharge of a specific employee are excluded from the definition of government records subject to access under OPRA.

Applying these standards, we hold that the need for nondisclosure substantially outweighs plaintiff's need for disclosure of the IA records. Loigman factors one, two, and three militate strongly against disclosure of IA records. In that regard, the same concerns we have previously discussed apply with equal force to the common law right of access. Likewise, the questionable adequacy of protecting anonymity through simple redaction apply equally to the common law right of access.

In addition, pursuant to N.J.S.A. 40A:14-181, the UCPO adopted and implemented guidelines consistent with the IAPP that compel the UCPO to maintain the confidentiality of the IA investigation and report.

Reversed and remanded for the entry of an order consistent with this opinion.

ORDER ON MOTION

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
RICHARD RIVERA	DOCKET NO. A-002573-19T3
V.	MOTION NO. M-007423-19
UNION COUNTY PROSECUTOR'S	BEFORE PART A
OFFICE AND JOHN ESMERADO ETC.	JUDGE(S): RICHARD J. GEIGER ARNOLD L. NATALI JR.

MOTION FILED: 06/29/2020 BY: RICHARD RIVERA

ANSWER(S) FILED: 07/09/2020 BY: UNION COUNTY PROSECUTOR'S OFFICE

SUBMITTED TO COURT: July 09, 2020

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 29th day of July, 2020, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

MOTION FOR RECONSIDERATION DENIED

SUPPLEMENTAL: Plaintiff Richard Rivera contends it was error for this court to decide the issue of whether the internal affairs (IA) investigation material is subject to disclosure under the common law right of access, which was not reached by the trial court. He argues this issue should have been remanded to the trial court for in camera review and a common law balancing test in the first instance. We disagree.

An "appellate court may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." R. 2:10-5. "This rule is derived from explicit language in the state constitution authorizing New Jersey appellate courts to decide issues in the first instance under certain circumstances." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:10-5 (2020). While "the exercise of original jurisdiction should not occur routinely," exercising original jurisdiction "is particularly appropriate . . . where the record is adequate," further factfinding is not required, and "the issue to be decided is one of law and implicates the public interest." Vas v. Roberts, 418 N.J. Super. 509, 523-24 (App. Div. 2011) (citations omitted); see also Election Law Enf't Comm'n v. DiVincenzo, 451 N.J. Super. 554, 570 (App. Div. 2017).
We concluded it was appropriate to do so in this matter for the following reasons.

The right to access confidential IA records is a legal issue. Accordingly, we exercise de novo review of trial court decisions concerning access to government records under the common law right of access. Drinker Biddle & Reath LLP v. Dep't of Law & Pub. Safety, 421 N.J. Super. 489, 497 (App. Div. 2011).

We also concluded that further factfinding was not required. The underlying facts essential to determining the need for confidentiality are essentially undisputed. The nature of the alleged misconduct, involving racially and sexually derogatory slurs used by Police Director Cosgrave when referring to police department employees; the identity and position of the individual being investigated; the outcome of the IA investigation, which sustained the allegations; and Cosgrove's resignation shortly after the Attorney General called for his resignation, are all known and not in dispute. Similarly, the promises made to the complainants and witnesses, who were otherwise reluctant to provide statements to investigators, that their identities and the statements they provided would remain confidential, is not in dispute. Nothing would be gained by a painstaking document by document examination given the undisputed facts and categorical nature of the exclusion from disclosure. Thus, neither an in camera review of the statements given by the complainants and witnesses nor additional factfinding were required to enable this court to assess whether the need for confidentiality of the IA materials outweighed plaintiff's interest in disclosure under the common law.

In our opinion, we outlined the many reasons for maintaining the confidentiality of the IA materials. We need not repeat them here. Those reasons apply with equal force to our analysis under both the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, and the common law right of access.

The need for confidentiality of the IA materials, including the anonymity of the witnesses and complainants and their embedded statements, necessarily involves the public interest.

Therefore, we found the common law issue was ripe for determination and concluded defendants had met their burden of showing the public interest in preventing disclosure outweighed plaintiff's interest in access to the IA materials.

We also took into consideration that "when reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than a citizen's status and good faith are necessary to call for the production of documents." Loigman v. Kimmelman, 102 N.J. 98, 105-06 (1986). We reiterate that disclosure of the IA materials would have a chilling effect on future IA investigations due to the potential for retaliation and intimidation. See State v. Morias, 359 N.J. Super. 123, 132 (App. Div. 2003) (recognizing the so-called "blue wall of silence," "common parlance

for police officers' reluctance to incriminate their fellow officers" charged with misconduct, despite their personal knowledge of the facts).

We were also mindful of the serious concerns regarding in camera review of sensitive documents discussed at length in Loigman, 102 N.J. at 108-10. The Court noted that in camera review "alone may jeopardize the legitimate interests of the government . . . in the confidentiality of the withheld documents." Id. at 108. The Court concluded "that a right to automatic in camera inspection is not warranted." Id. at 109. While we recognize that Loigman involved the need to protect the identity of confidential informants in criminal investigations, the identity of complainants and witnesses must also be protected in IA investigations. Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 459 N.J. Super. 458, 507 (App. Div.), certif. granted, 240 N.J. 7 (2019). As we have previously recognized, "under certain circumstances, even the redaction of all personally identifiable information would not prevent reasonable persons . . . from identifying" a complainant or witness. L.R. v. Camden City Sch. Dist., 452 N.J. Super. 56, 90 (App. Div. 2017). Any such unintended disclosure of a complaint's identity "could thwart IA investigation" and "discourage complainants from coming forward." Fraternal Order of Police, 459 N.J. Super. at 507.

Moreover, the need for confidentiality involves more than just preserving the anonymity of the complainants and witnesses. Any fear that the confidentiality of statements given to investigators will not be maintained would dissuade witnesses and complainants from cooperating by giving statements to investigators, thereby impairing the ability to conduct future IA investigations.

Finally, plaintiff argues that we should have remanded the issue of disclosure under the common law right of access because the parties did not brief or argue this issue on appeal. We are unpersuaded by this argument. Plaintiff pleaded the common law right of access in his complaint. The parties raised the common law right of access in their submissions to the trial court. Because additional factfinding was not necessary to determine this legal issue, the common law right of access issue was ripe for determination.

For these reasons, we deny plaintiff's motion for reconsideration.

FOR THE COURT:

/s/Richard J. Geiger, J.A.D.

RICHARD J. GEIGER, J.A.D.

2017 WL 957735
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

John PAFF, Plaintiff–Respondent,
v.
BERGEN COUNTY and Captain William Edgar, Defendants–Appellants.

DOCKET NO. A–1839–14T1
|
Argued October 20, 2016
|
Decided March 13, 2017

Synopsis

Synopsis

Background: Records requester filed an order to show cause and complaint against county and county sheriff's office's custodian of records for violating the Open Public Records Act (OPRA) and his common law right to access, and seeking an order for the release of unaltered copies of requested documents. The Superior Court, Law Division, Bergen County, ordered disclosure and awarded requester $6,438.69 in attorney fees and costs. County and custodian of records appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] requester's access to public records was not wrongfully denied by county or sheriff's office's record's custodian;

[2] requester did not have a common law right to access personal identifiers in a log of complaints filed against corrections officers who had worked in county jail; and

[3] county's failure to provide an explanation for redactions in internal affairs records produced pursuant to a records request, while sufficient to trigger a violation of the Open Public Records Act (OPRA), was insufficient to entitle requester to an award of attorney fees.

Reversed.

West Headnotes (3)

[1] Records In camera inspection; excision or deletion

Records requester's access to public records in the form of a log of complaints against corrections officers who had worked in the county jail was not wrongfully denied by county or county sheriff's office's record's custodian, even though the documents produced were redacted to remove personal identifiers; a general order issued by county sheriff incorporating Attorney General guidelines for internal affairs investigations as mandated by statute was binding and enforceable, and thus, because the guidelines required internal affairs investigation documents and reports remain confidential, and that the names of complainants and subject officers shall not be published, county sheriff's office was required to redact internal affairs documents subject to the records request so as to comply with the guidelines. N.J. Stat. Ann. §§ 40A:14-181, 47:1A-9(a).

[2] Records Access to records or files in general

Records requester did not have a common law right to access personal identifiers in a log of complaints filed against corrections officers who had worked in county jail; disclosure of personal identifiers would have disrupted procedures designed to maintain safety and security in the facility, and the disclosure of a complainant's identity, who provided information relying on its confidential status, could cause him or her to suffer adversely. N.J. Stat. Ann. § 47:1A-8.

[3] Records Costs and fees

County's failure to provide an explanation for redactions in internal affairs records produced pursuant to a records request, while sufficient to trigger a violation of the Open Public Records Act (OPRA), was insufficient to entitle requester to an award of attorney fees, where the county timely released redacted documents, starting the process with some form of response, the response was appropriate in light of the Attorney General guidelines, and there was no unjustifiable denial of access. N.J. Stat. Ann. §§ 47:1A-5(g), 47:1A-6.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L–7739–14.

Attorneys and Law Firms

Christopher E. Martin argued the cause for appellants (Morrison Mahoney, LLP, attorneys; Mr. Martin, of counsel and on the briefs; Lina Papalia Corriston, on the briefs).

Donald M. Doherty, Jr., argued the cause for respondent.

Before Judges Lihotz, Hoffman and Whipple.

Opinion

PER CURIAM

***1** We are asked to determine whether defendants Bergen County and Captain William Edgar, as the custodian of records for the Bergen County Sheriff's Office, improperly responded to a request filed under the Open Public Records Act (OPRA), *N.J.S.A.* 47:1A–1 to -13. Plaintiff John Paff requested a log of complaints against corrections officers who have worked in the county jail since January 1, 2012. Defendants responded, providing the log, which was redacted to remove personal identifiers, specifically, the names of complainants and the officers against whom the complaint was made. Plaintiff filed this action asserting defendants' response violated OPRA. In a written opinion, the Law Division judge rejected defendants' arguments the redactions were made pursuant to Attorney General guidelines for internal affairs investigations. The trial judge concluded assertions of confidentiality did not fall within a statutory exemption listed under OPRA, and found the documents were improperly redacted. He ordered disclosure and awarded plaintiff attorney fees and costs. Defendants appeal. We reverse.

Plaintiff submitted an OPRA request seeking records regarding internal affairs investigations of corrections officers in the Bergen County Jail. The June 19, 2014 government records request stated:

> I am interested in researching the frequency and nature of complaints brought, either internally or by an inmate or member of the public, against corrections officers who work for the Bergen County Jail. I believe that the type of complaints I am interested in might be referenced to as "Internal Affairs" matters.

The request further explained plaintiff sought "a log of such complaints," filed from "January 1, 2012 to the present," and advised if defendants did not maintain a log of all the complaints, copies of documents for each individual complaint be provided. Plaintiff also acknowledged the request might prompt an objection, and noted if the request were denied, defendants were asked to confirm responsive records do exist. Plaintiff alternatively suggested "a redacted form" could be provided "rather than" suppressing the request entirely.

Defendants released a redacted five-page form entitled "Internal Affairs Summary Report" identifying the number of complaints pending, the source of the complaint and the noted disposition (e.g., internal disciplinary action, exonerated, not sustained, unfounded, administratively closed). The document also identified the type of complaint among categories identified as differential treatment, domestic violence, and other rule violations. Also, defendants provided four pages containing closed cases from 2012 to 2014. These documents identified the date and category of each complaint (e.g., excessive force, assault, harassment, and others), but blacked-out identifying information regarding the complaining party and the employee alleged to have acted improperly.

Plaintiff filed an order to show cause and complaint initiating this summary action. He noted the records response improperly redacted information without explanation. He requested a judgment against defendants for violating OPRA and plaintiff's common law right to access. Plaintiff also sought an order for the release of unaltered copies of the internal affairs summary and closed matters, along with an award of attorney's fees.

***2** Defendants objected to plaintiff's claims and asserted the redacted information was exempt from disclosure as confidential, in compliance with the Attorney General's Internal Affairs Policies and Procedures (the Guidelines), adopted by the Bergen County Sheriff's Office, along with its internal affairs investigation guidelines. Defendants acknowledged the response to plaintiff's records request mistakenly omitted the explanatory basis for redaction, which was promptly provided.

On the return date, defendants requested to present testimony from Captain Edgar, which the trial judge found unnecessary. Following oral argument, the trial judge issued a written opinion. He found no "statutorily recognized basis for confidentiality," and rejected the Guidelines as protecting the redacted information from public disclosure. The trial judge concluded defendants impeded public access as required by OPRA, stating

> defendants have violated the terms, if not the spirit of OPRA and the common law by refusing to afford plaintiff access to the requested documents. Specifically, defendants have failed to demonstrate the requested documents are exempt from disclosure pursuant to one of OPRA's exemptions or one of the exceptions incorporated in the statute by reference. Defendants have also failed to demonstrate the State's interest in nondisclosure outweighs plaintiff's right of access to the requested materials under the common law.

The November 6, 2014 order required defendants to release unredacted copies of the records and awarded plaintiff $6,438.69 in attorney's fees and costs of suit. Defendants' appeal ensued.[1]

Generally, a "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to de novo review." *K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337, 349 (App. Div. 2011) (quoting *O'Shea v. Township of West Milford*, 410 *N.J. Super.* 371, 379 (App. Div. 2009)), *certif. denied*, 210 *N.J.* 108 (2012); *see also MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 *N.J. Super.* 534, 543 (App. Div. 2005) ("We review *de novo* the issue of whether access to public records under OPRA and the manner of its effectuation are warranted."). "Our review of the determination regarding the common law right of access is de novo as well." *N. Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor's Office*, 447 *N.J. Super.* 182, 194 (App. Div. 2016).

"New Jersey citizen's access to government records may be achieved in three distinct ways: through OPRA, ...; via a common law right of access; and in discovery procedures in litigation." *O'Shea*, *supra*, 410 *N.J. Super.* at 379. "Records that are not available under one approach may be available through another." *Ibid.* (quoting *MAG Entm't*, *supra*, 375 *N.J. Super.* at 543).

[1] We start with an analysis of OPRA, which "must begin with the recognition that the Legislature created OPRA intending to make government records 'readily accessible' to the state's citizens 'with certain exceptions[ ] for the protection of the public interest.' " *Gilleran v. Bloomfield*, 227 *N.J.* 159, 170 (2016) (quoting *N.J.S.A.* 47:1A–1). OPRA "sets forth in detail the manner in which requests for inspection, examination, and copying of government records are to be addressed, at times underscoring the responsiveness and cooperation expected from custodians." *Ibid.* (citing *N.J.S.A.* 47:1A–5). Further, the statute mandates "all government records shall be subject to public access unless exempt," *N.J.S.A.* 47:1A–1, and it places on the government the burden of establishing an exemption. *N.J.S.A.* 47:1A–6; *see Mason v. City of Hoboken*, 196 *N.J.* 51, 66–67 (2008). OPRA's broad right to access is not absolute; it is limited by "established public-policy exceptions," stated in the statute, which declare "[a] government record shall not include ... information which is deemed to be confidential." *Gilleran*, *supra*, 227 *N.J.* at 170 (quoting *N.J.S.A.* 47:1A–1.1). However, the public entity must include specific reasons for withholding documents, *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 *N.J. Super.* 140, 162 (App. Div. 2011), and must prove a "denial of access is authorized by law." *N.J.S.A.* 47:1A–6.

***3** On appeal, defendants concede plaintiff requested government records and acknowledge they bear the burden of proving the requested documents were exempt from disclosure. Defendants argue the trial judge erred in his analysis for several reasons.

First, defendants insist access was not denied. A timely response to plaintiff's request was issued and documents were released, which capture "the frequency and nature of complaints brought" against corrections officers for the years listed. This was precisely what defendant sought.

Second, redaction was limited to confidential information, i.e., the names of the complainant and the persons subject to

pending investigations, because release of this information is prohibited by the Guidelines.

Third, defendants characterize their omission of an explanation for the redaction as "a ministerial error," which did not thwart plaintiff's investigation because he himself understood the need for redaction of identities in his request and assented to defendants "providing it [to] me in redacted form."

In his response, plaintiff maintains the correctness of the trial judge's analysis and highlights he was a prevailing party entitled to attorney's fees because defendants "responded to [his OPRA request] with a pile of documents that were redacted without explanation at all."

The statute's definition section lists those documents that are not government records subject to OPRA's disclosure requirements. *N.J.S.A.* 47:1A–1.1 provides "[a] government record shall not include the following information which is deemed to be confidential[,]" followed by thirty-one categories of documents. The trial judge correctly noted there is no specific reference to the Guidelines as a delineated source of confidential records. However, this literal review overlooks the depth of the recognized exceptions.

> *N.J.S.A.* 47:1A–1 explicitly recognizes that records may be exempt from public access based upon authorities other than the exemptions enumerated within OPRA:
>
> > [A]ll government records shall be subject to public access unless exempt from such access by: [OPRA] as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor ....
>
> Moreover, *N.J.S.A.* 47:1A–9 codifies the Legislature's unambiguous intent that OPRA not abrogate or erode existing exemptions to public access:
>
> > a. The provisions of [OPRA] shall not abrogate any exemption of a public record or government record from public access heretofore made pursuant to [the Right-to-Know Law, *N.J.S.A.* 47:1A–1 to -4]; any other statute; resolution of either or both Houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor ....
>
> [*N. Jersey Media Grp.*, *supra*, 447 *N.J. Super.* at 202.]

"Therefore, the plain language of the statute as well as judicial precedent make it clear that an exemption is statutorily recognized by OPRA if it is established by any of the authorities enumerated in *N.J.S.A.* 47:1A–1 or -9." *Ibid.* (emphasis added).

We recognize the Guidelines along with Attorney General directives and policies are not adopted in the same way other executive agencies adopt their guiding administrative rules promulgated under the Administrative Procedure Act, *N.J.S.A.* 52:14B–1 to -15. *O'Shea*, *supra*, 410 *N.J. Super.* at 378. Nevertheless, the Attorney General "is charged with adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process." *Id.* at 382. These "guidelines, directives or policies cannot be ignored," and "are binding and enforceable on local law enforcement agencies ...." *Id.* at 378.

***4** Internal affairs investigations by law enforcement agencies fall under the supervision of the Attorney General, who is New Jersey's chief law enforcement officer. *N.J.S.A.* 52:17B–98. The Guidelines relied on by defendants in this case were adopted pursuant to the authority granted to the Attorney General set forth in *N.J.S.A.* 40A:14–181,[2] which states:

> Every law enforcement agency ... shall adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.

This "statute requires every law enforcement agency to adopt and implement guidelines consistent with the Attorney General's internal affairs policies and procedures." *McElwee v. Borough of Fieldsboro*, 400 *N.J. Super.* 388, 395 (App. Div. 2008).

"The Attorney General's Internal affairs policies and procedures were first published in 1991." *See* State of New Jersey Division of Criminal Justice, *Internal Affairs Policy & Procedures*, 3 (July 2014), http://www.state.nj.us/lps/dcj/agguide/internalaffairs2000v1_2.pdf. Updates to the policy were promulgated in 1992, 2000, 2011, and 2014. *Ibid.* Referencing *N.J.S.A.* 40A:14–181, the Guidelines discuss the importance of the internal affairs function in law

enforcement agencies to investigate complaints and "protect the constitutional rights and civil liberties of the state's citizens." *Ibid.* Further, "strict adherence" to the policies and procedures by "subordinate law enforcement agencies" is demanded. *Id.* at 3–4.

Although the Attorney General does not oversee the State's corrections system, the Guidelines are mandated for all "county and municipal law enforcement agencies, including ... county sheriff's offices ...." *Id.* at 5. Moreover, in various contexts, the Legislature has defined "law enforcement agency" to include county correctional facilities. *N.J.S.A.* 2A:154–4 ("All corrections officers of the State of New Jersey ... shall by virtue of such appointment or employment and in addition to any other power or authority be empowered to act as officers for the detection, apprehension, arrest and conviction of offenders against the law."); *N.J.S.A.* 52:17B–77.6 (" '[C]ounty or municipal law enforcement agency' means and includes, but is not limited to, a county or municipal policy department or force, a county corrections department and a county sheriff's office."); *N.J.S.A.* 52:17B–212 (" '[L]aw enforcement agency' means a department, division, bureau, commission, board, or other authority of the State or of any political subdivision thereof which employs law enforcement officers.").

Similar to the Attorney General Use of Force guidelines examined in *O'Shea*, we conclude the Guidelines were created pursuant to a statutory mandate and law enforcement agencies must adhere to them. "There can be no question that they have the force of law in respect of the duties of law enforcement agencies to conform to the requirements" when conducting internal affairs investigations as well as the agency's accountability for doing so. *O'Shea*, *supra*, 410 *N.J. Super.* at 384.

***5** Before the trial judge, defendants argued the Guidelines require internal affairs investigation documents and reports remain confidential. Examination of the Guidelines reveals they contain specific provisions directly on point, stating, "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information and shall only be released under ... limited circumstances." *Ibid.* (alterations in original).

Requirement 8 addresses the treatment of internal affairs records. The records are accessible only to internal affairs personnel and the law enforcement agency executive, keeping the number of individuals with access "to a minimum." Guidelines, *supra*, at 40. Obviously, this restriction is designed to preserve the integrity and secrecy of any investigation. This requirement also expressly addresses confidentiality, stating, "The nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." *Id.* at 42. Moreover,

> [t]he information and records of an internal affairs investigation content and shall only be released under the following limited circumstances:
>
> • If administrative charges have been brought against an officer and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer before the hearing.
>
> • If the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal affairs investigation, a copy of the internal affairs investigation reports, may be released to the subject officer, agency or jurisdiction.
>
> • Upon the request or at the direction of the county prosecutor or Attorney General.
>
> • Upon a court order.
>
> [*Id.* at 42.]

"In addition, the law enforcement [agency] executive officer may authorize access to a particular file or record for good cause." *Ibid.* Such access may be granted "sparingly, given the purpose of the internal affairs process and the nature of many of the allegations against officers." *Ibid.*

Requirement 9 addresses the summary reports, which are prepared and submitted to the county prosecutor. *Id.* at 43. This is the exact report sought by plaintiff's OPRA request.

Requirement 10 expressly provides the mechanism for release of these reports to the public. *Id.* at 44. The report released to the public is statistical in nature and "the names of the complainants and subject officers shall not be published." *Ibid.* (emphasis added).

It is not disputed, the Bergen County Sherriff issued a general order incorporating the Guidelines as mandated by *N.J.S.A.* 40A:14–181, and adopted specific policies "consistent with" the Guidelines to govern internal affairs investigations, which protect the public from misconduct and abuse by

law enforcement. *See McElwee*, *supra*, 400 *N.J. Super.* at 395. The Sheriff operates and is responsible for corrections personnel employed by the Bergen County Jail. In accordance with the Guidelines, the Sheriff followed the confidentiality provisions by redacting the complainant and the target of an internal affairs investigation. Further, in responding to plaintiff's OPRA request, defendants followed the Guidelines' directive explicitly, releasing exactly what information was permitted to be released to the public.

We reject plaintiff's assertion, which was mistakenly accepted by the trial judge, to confine review of excluded documents to *N.J.S.A.* 47:1A–1.1, without also considering the exceptions provided by *N.J.S.A.* 47:1A–9(a). Reading these statutory provisions together, *see Gilleran*, *supra*, 227 *N.J.* at 172 (stating when construing OPRA, courts do not "view the statutory words in isolation but 'in context with related provisions so as to give sense to the legislation as a whole.' " (quoting *Murray v. Plainfield Rescue Squad*, 210 *N.J.* 581, 592 (2012))), we conclude defendants met their "burden of proving that the denial of access is authorized by law." *N. Jersey Media Grp.*, *supra*, 447 *N.J. Super.* at 195 (quoting *N.J.S.A.* 47:1A–6). The published Guidelines unequivocally require internal affairs investigation reports, such as those sought by plaintiff's OPRA request, to remain confidential as to the complainant and the officer against whom the complaint was directed. Thus, public access was not denied; rather, it was limited as recognized by *N.J.S.A.* 47:1A–9(a).

***6** Unlike the trial judge, we are convinced the basis of the Attorney General's confidentiality requirement stated in the Guidelines is tethered to safety and security. Maintenance of strict discipline is important in military-like settings such prisons and correctional facilities. *Rivell v. Civil Serv. Comm'n*, 115 *N.J. Super.* 64, 72 (App. Div.), *certif. denied*, 50 *N.J.* 269 (1971). In this regard, there are many reasons for maintaining confidentiality of the complainant and officer involved an internal affairs investigation. We identify a few. Disclosure of the complainant and subject officer could: thwart the very purpose of an internal affairs investigation designed to ferret out improper compliance with established policies and procedures by law enforcement agencies; impede further investigation of discovered criminal conduct subject to prosecution; undermine the disciplinary process of the law enforcement agency necessary for its work; unduly taint officers when the basis for an alleged complaint were not established; reveal the name and location of inmates, which may subject the inmate to harm; target informants, *see Caldwell v. N.J. Dep't of Corr.*, 250 *N.J. Super.* 592, 615 (App. Div.) (recognizing "the aim of safeguarding the staff and inmate informants" requires the identity of witnesses in a disciplinary hearing should be kept confidential), *certif. denied*, 127 *N.J.* 555 (1991); discourage complaints because the complainant will not obtain anonymity, *see* Biunno, Weissbard & Zegas, *Current N.J. Rules of Evidence*, cmt. 2 on *N.J.R.E.* 516 (2014) ("[C]oncern for the risk to the informer of disclosure of his identity as well as the chilling effect disclosure may have on sources of valuable information are relevant factors in a prison setting." (citing *Wakefield v. Pinchak*, 289 *N.J. Super.* 566, 571 (App. Div. 1996))); and encourage unwarranted complaints to seek notoriety or target an officer for reasons other than wrongdoing.

Although not determinative, we also note our conclusion aligns with *N.J.A.C.* 10A:34–1.6(a)(2), a regulation applicable to municipal detention facilities, which makes internal affairs and investigation unit records and reports confidential but allows release in redacted form to "protect the safety of any person or the safe and secure operation of the detention facility...." Also, we note decisions issued by the General Records Council reach a similar conclusion. *See, e.g.*, *Wares v. Township of West Milford (Passaic)*, GRC Complaint No. 2014–274 (May 2015); *Blaustein v. Lakewood Police Dep't (Ocean)*, GRC Complaint No. 2011–102 (June 2012); *Rivera v. Borough of Keansburg Police Dep't (Monmouth)*, GRC Complaint No. 2007–222 (June 2010).

Contrary to any inference drawn from the trial judge's comments, interpreted to mean the public records were withheld or plaintiff's access was wrongfully denied, we conclude plaintiff in fact received exactly what he is entitled to obtain.

[2] Next, we consider whether plaintiff has a common law right to access. OPRA does not limit "the common law right of access to a government record." *N.J.S.A.* 47:1A–8. Common law allows "one seeking access to such records must 'establish that the balance of its interest in disclosure against the public interest in maintaining confidentiality weighs in favor of disclosure.' " *Keddie v. Rutgers*, 148 *N.J.* 36, 50 (1997) (quoting *Home News v. N.J. Dep't of Health*, 144 *N.J.* 446, 454 (1996)).

Three requirements must be met to establish a common law right of access: "(1) the records must be common-law public documents; (2) the person seeking access must 'establish an interest in the subject matter of the material'; and (3) the citizen's right to access 'must be balanced against the State's

interest in preventing disclosure.' " *Keddie*, *supra*, 148 *N.J.* at 50 (citations omitted). We focus on the third provision.

To balance the right of access against the State's interest in preventing disclosure, the court must consider multiple factors:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> ***7** [*Daily Journal v. Police Dept. of Vineland*, 351 *N.J. Super.* 110, 123 (App. Div.) (quoting *Loigman v. Kimmelman*, 102 *N.J.* 98, 113 (1986)), *certif. denied*, 174 *N.J.* 364 (2002).]

The record is sparse, providing few facts on these issues. However, as is set forth in the above OPRA analysis, we identify how disclosure would disrupt procedures designed to maintain safety and security in the facility and how disclosure of the complainant, who provided the information relying on its confidential status, would cause the complainant to suffer adversely. We recognize these factors are also recited by the Attorney General in the Guidelines. Guidelines, *supra*, at 42.

"[W]hen reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than citizen's status and good faith are necessary to call for production of documents." *Loigman*, *supra*, 102 *N.J.* at 105–06. *See also State v. Morais*, 359 *N.J. Super.* 123, 132 (App. Div.) (discussing the "blue wall" as recognizing law enforcement officers' reluctance to incriminate fellow officers regarding misconduct), *certif. denied*, 177 *N.J.* 572 (2003).

We conclude defendants have carried their burden. The balance tips in favor of preserving confidentiality.

[3] Finally, we consider whether the absence of an explanation for the redactions triggered an OPRA violation. OPRA provides:

> If the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.... If the custodian of a government record asserts that part of a particular record is exempt from public access ... the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record.
>
> [*N.J.S.A.* 47:1A–5.]

See Gannett N.J. Partners, LP v. County of Middlesex, 379 *N.J. Super.* 205, 215 (App. Div. 2005) ("[OPRA] generally places the burden upon the custodian of a public record to state the 'specific basis' for the denial of access ....") (quoting *N.J.S.A.* 47:1A–5(g)). "Courts will simply no longer accept conclusory and generalized allegations of exemptions ...." *Newark Morning Ledger*, *supra*, 423 *N.J. Super.* at 162 (citations omitted).

Defendants admit their lapse in omitting the basis of the redactions of confidential information. They argue the omission is harmless because plaintiff recognized redactions were necessary by agreeing to accept the records in redacted form, the nature of the excised information was clear on its face, and all permitted information was transmitted.

Although plaintiff's OPRA request mentions acceptance of records in redacted form, we cannot accept this statement relieved defendants of the affirmative obligation set forth in *N.J.S.A.* 47:1A–5(g). Accepting our responsibility to "maintain a sharp focus on the purpose of OPRA and resist attempts to limit its scope," *Newark Morning Ledger*, *supra*, 423 *N.J. Super.* at 162–63 (citations omitted), we conclude, although defendants proved disclosure of the redacted information was exempt, the OPRA response failed to disclose the basis for redaction. In addition, we agree the list of closed cases obviously omits names of affected parties, but the nature of redactions to the Internal Affairs Summary Report Form is not so obvious. Further, defendants' reliance on the Guidelines should have also related the expressed reasoning for maintaining confidentiality, which may not be as obvious to non-law enforcement members of the public.

***8** In light of these omissions, we consider whether plaintiff is entitled to a fee award. The fee provision in OPRA allows "[a] person who is denied access to a government record by the custodian of the records" to institute a proceeding. *N.J.S.A.* 47:1A–6. Further:

> The right to institute any proceeding under this section shall be solely that of the requestor.... If it is determined that access has been improperly denied, the court ... shall order that access be allowed. A requestor who prevails in any proceeding shall be entitled to a reasonable attorney's fee.
>
> [*Ibid.*]

Plaintiff's suit was prompted because he sought the redacted information—the names of the complainant and the officer against whom the complaint was made. We reverse that portion of the November 6, 2014 order mandating release of unredacted documents, and conclude defendants redacted only permitted confidential information noting plaintiff does not suggest any other information was withheld. Thus, plaintiff was not denied access to government records; defendants released all records the public was entitle to review.

The Court has directed:

> requestors are entitled to attorney's fees under OPRA, ... when they can demonstrate: (1) "a factual causal nexus between plaintiff's litigation and the relief ultimately achieved"; and (2) "that the relief ultimately secured by plaintiffs had a basis in law."
>
> [*Mason v. City of Hoboken*, 196 *N.J.* 51, 76 (2008) (quoting *Singer v. State*, 95 *N.J.* 487, 494, *cert. denied*, 469 *U.S.* 832, 105 *S. Ct.* 121, 83 *L.Ed.* 2d 64 (1984)).]

In a determination of whether to award attorney's fees, the trial court should consider "the public importance of the matter, the degree of success achieved, the ... risk ... of non-payment, and any other factors" supporting the request. *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.*, 185 *N.J.* 137, 158 (2005).

In *Mason*, the Court observed an OPRA request should not become a battle over attorney's fees. *Mason*, *supra*, 196 *N.J.* at 79. Here, defendants timely released redacted documents, starting the "process with some form of response." Defendants failed to fulfill the obligations to articulate reasons for the claimed exemption. We locate no authority, and plaintiff offers none, imposing attorney's fees for this type of omission. Fees are awarded when the records response is ignored, trammeling OPRA's objective of a transparent government. Defendants' response was appropriate and there was no unjustifiable denial of access. Therefore, plaintiff cannot meet *Mason*'s two-pronged test and is not entitled to an award of attorney's fees.

Reversed.

All Citations

Not Reported in Atl. Rptr., 2017 WL 957735

Footnotes

1 Defendants filed a motion, which included a request to supplement the record (M–5367–14). An April 16, 2015 order was referred to this panel for consideration. The motion was granted.

2 The quoted portion reflects *N.J.S.A.* 40A:14–181 as was in effect when this matter arose. The phrase omitted in the quotation was effective on September 1, 2015, by *P.L.* 2015, *c.* 52, which expands "law enforcement agency" by adding "including a police department of an institution of higher education established pursuant to *P.L.* 1970, *c.* 211 ([*N.J.S.A.*] 18A:6–4.2 et seq.)."

ORDER PREPARED BY THE COURT

GANNETT SATELLITE INFORMATION NETWORK (d/b/a ASBURY PARK PRESS)	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION,
Plaintiff,	DOCKET NO.: MON-L-2616-17
v.	**ORDER**
TOWNSHIP OF NEPTUNE	
Defendant.	

THIS MATTER having been brought before the Court by Defendant's Motion to Dismiss, and Plaintiffs complaint seeking disclosure under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, and the common law right of access, and the court having considered the arguments of counsel and all papers submitted, for the reasons stated in the accompanying opinion attached hereto

IT IS on this 1 day of August, 2018 **ORDERED:**

(1) That defendant's motion to dismiss is granted in part, and denied in part. Plaintiff's OPRA claim is dismissed with Prejudice; and

(2) On Plaintiff's complaint for the common law right of access Defendant shall grant plaintiff access to the requested records subject to appropriate redactions as expressed in the accompanying opinion; and

(3) Counsel for Plaintiff and Defendant are to consult and if possible, agree on redactions. If an agreement cannot be reached, defendant shall provide the court with a copy of the records and shall highlight and tab the proposed redactions for the court's consideration;

(4) Counsel for Plaintiff and Defendants are to confer and attempt to resolve the reasonable attorney's fees to which Plaintiff is entitled. If counsel cannot agree, Plaintiff's counsel shall submit a Certification of Services delineating the amount of fees requested. Plaintiff's counsel shall prepare and submit, under the five-day rule, R. 4:42-1, an order that comports with this Court's ruling, and if necessary, the Certification of Services delineating the amount of attorney's fees requested.

/s/ Lisa P. Thornton
HONORABLE LISA P. THORNTON, A.J.S.C.

NOT FOR PUBLICATION WITHOUT APPROVAL FROM THE COMMITTEE ON OPINIONS

GANNETT SATELLITE INFORMATION NETWORK (d/b/a ASBURY PARK PRESS) Plaintiff, v. TOWNSHIP OF NEPTUNE Defendant.	SUPERIOR COURT OF NEW JERSEY MONMOUTH COUNTY LAW DIVISION, DOCKET NO.: MON-L-2616-17 **OPINION**

Decided: August 1, 2018

Thomas J. Cafferty for plaintiff (Gibbons, P.C., attorneys);

Jonathan F. Cohen for defendant (Plosia Cohen LLC, attorneys).

THORNTON, A.J.S.C.

I.

In this action in lieu of prerogative writs, this court considers whether defendant's refusal to provide access to Philip Seidle's internal affairs records violates the provisions of the Open Public Records Act, N.J.S.A. 47:1A-1 to -13, (hereinafter "OPRA") and the common law right of access. There is no question that "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information" according to the Attorney General's Internal Affairs Policies and Procedures[1] (hereinafter "IAPP"). The IAPP were first issued in 1991 consistent with the Attorney General's broad statutory authority. N.J.S.A. 52: 17B-98. In enacting N.J.S.A 40A:4-181, a law that requires all police departments to adopt and implement

[1] NEW JERSEY ATTORNEY GENERAL, Internal Affairs Policy & Procedures (1991) (revised 2017).

guidelines consistent with the IAPP, the Legislature bestowed the *imprimatur* of statutory authority on the IAPP. Consequently, because the confidentiality provision of the IAPP has been codified by statute, the records are exempt from access pursuant to OPRA. N.J.S.A. 47:1A-9.

However, plaintiff's common law right of access claim is granted in part, subject to redactions and exclusions for names of victims, other officers, other named individuals, and personnel records, including any administrative charging forms and dispositions, if applicable.[2] One seeking access to Internal Affairs Records bears a heavy burden to establish that its interest in disclosure outweighs the compelling policy reasons that militate in favor of confidentiality.[3] In the present matter, the tragic death of Tamara Seidle received widespread media attention, accompanied by a "justifiable public outcry"[4] that sought to gain a better understanding of how such a tragedy could have occurred.

After careful review of the records *in camera*, this court is convinced that a balancing of the Loigman[5] factors weighs in favor of disclosure. The majority of the incidents included in Philip Seidle's internal affairs file have already been disclosed by either the Monmouth County Prosecutor's Office ("MCPO") or the Asbury Park Press ("APP"),[6] a fact that diminishes the public's interest in

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[2] The parties shall consult and if possible, agree on the redactions. If an agreement cannot be reached, defendant shall provide the court with a copy of the records and shall highlight and tab the proposed redactions for the court's consideration.

[3] Neither the Attorney General nor the Monmouth County Prosecutor chose to intervene in this matter.

[4] Monmouth County Prosecutor's Office Internal Review of Law Enforcement Response to the Killing of Tamara Seidle on June 16, 2015, at 1 (June 30, 2016), https://mcponj.org/2016/06/30/internal-review-results-of-law-enforcement-response-to-tamara-seidle-killing-released/.

[5] Loigman v. Kimmelman, 102 N.J. 98, 104 (1986).

[6] Andrew Ford, *Philip Seidle, killer cop: Ex-wife 'did not become a victim until I killed her*,' Asbury Park Press, Jan. 1, 2018, https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/philip-seidle-exclusive-interview/109503924/. The article cites several sources, including depositions of Neptune Township Police Chief James Hunt, Neptune Police Incident Reports,

confidentiality of these records. To deny access at this point would be tantamount to closing the barn door after the horse has bolted.

II.

The relevant facts are undisputed. On June 16, 2015, Philip Seidle, an off duty Neptune Township Police Sergeant, killed his ex-wife Tamara, when he shot her with his service revolver in front of their young daughter. After threatening to take his own life, Seidle eventually surrendered to police. In the days and weeks following the crime, a troubling narrative emerged that documented a long history of conflict and depicted Tamara Seidle as a victim of domestic violence.[7] Seidle plead guilty to aggravated manslaughter on March 10, 2016, and on September 29, 2016 he was sentenced to 30 years in prison.

On June 30, 2016, the MCPO released a report entitled "MONMOUTH COUNTY PROSECUTOR'S OFFICE INTERNAL REVIEW OF LAW ENFORCEMENT RESPONSE TO THE KILLING OF TAMARA SEIDLE ON JUNE 16, 2015." The report was designed to address the "police response to the scene of" the crime and to provide a "historical evaluation of any documented domestic violence incidents in the Seidles' past."[8] The report admittedly disclosed relevant information contained in Philip Seidle's confidential internal affairs file. According to page 4 of the report, the MCPO acknowledged that disclosure "is permitted in the discretion of the Prosecutor, pursuant to the New Jersey Attorney General Internal Affairs Policy & Procedures." The

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public court records and records received from Philip Seidle. After objecting to the release of his internal affairs file, Philip Seidle agreed to be interviewed by the Asbury Park Press and supplied the reporter with many confidential documents, including his personal psychologist records. He also provided the reporter with many facts included in his internal affairs file, including information regarding fitness for duty examinations and suspensions.

[7] This narrative was detailed in various media accounts.

[8] See Monmouth County Prosecutor's Office Internal Review of Law Enforcement Response to the Killing of Tamara Seidle on June 16, 2015, at 1.

report notes that twenty-one calls were made to the Neptune Township Police Department ("NTPD") by either Philip or Tamara Seidle and their children. The report also provides details on at least eight "Reported Domestic Violence Incidents" that occurred from 1994 through 2015. In addition, the report revealed extensive facts regarding disputes with other officers, fitness for duty evaluations, psychological treatment, and disciplinary actions. These details included in the report went far beyond what the MCPO was required to disclose.[9] Following is a summary of each incident as it was included in the report:

1. **March 27, 1994**: In the "first reported domestic violence (DV) incident," Philip Seidle called the NTPD to report that Tamara threw a chair at him "as a result of Philip Seidle's conduct."

2. **March 24, 2001**: "Seven years later, a second DV incident was reported" when one of the Seidle children, "at Tamara's direction," called to advise that the Seidles had an argument over who would make lunch for the children. The child reported the argument escalated to screaming and pushing.

3. **March 16, 2006**: NTPD responded to what "Tamara described [as] a verbal dispute between the couple." She told police that "Philip never hit, threatened or made any attempt to physically harm her."

4. **February 2, 2012:**[10] "The DV incident that took place on this date was the only incident that involved the Prosecutor's Office. The underlying incident did not trigger a mandatory notification to the Prosecutor's Office, however, the Neptune Township Police nonetheless notified the Prosecutor's Office anyway." The underlying incident involved a 911 call made by Tamara Seidle to report a verbal dispute with her husband. She advised officers that the parties were separated and "denied physical acts of violence" on the date in question, but reported that she had "been subjected to past incidents of physical abuse, but did not report them because she did not want Philip to have problems with his job as a police officer." She "declined to sign a complaint or seek a restraining order" but said she would make an appointment to speak with the Chief of Police to discuss her husband's behavior. Philip Seidle "unsuccessfully attempted to cancel the dispatch of responding officers to his home" and was "disciplined by his department for interfering with an investigation and suspended for two days."

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[9] NEW JERSEY ATTORNEY GENERAL, Internal Affairs Policy & Procedures, at 44 (1991) (revised 2014), requires every police agency to produce an "annual report summarizing the types of complaints received and the dispositions of those complaints," excluding the names of complainants and subject officers.

[10] The incident actually took place on February 6, 2012.

This incident prompted the NTPD to refer Philip Seidle for a "fitness-for-duty evaluation." In addition, as a result of the incident, the NTPD disarmed Seidle. On February 8, 2012 he was found "not fit for duty" and referred for psychotherapy. After attending therapy, he was found "fit for duty" on April 16, 2012 and "conditionally" re-armed by the MCPO on May 2, 2012 subject to conditions that required him to leave his weapon at work when he was off duty, continue therapy, and refrain from physical contact with his wife. On January 14, 2013, at the request of the NTPD he was re-armed by the MCPO.

5. March 28, 2014: On the date in question, the Seidles had a dispute over visitation with their children. Ms. Seidle reported that her husband "had been harassing her by yelling at her and texting her." Ms. Seidle "indicated that she wanted to file a complaint for harassment, but did not want a temporary restraining order." The NTPD notified the Monmouth County Prosecutor's Office regarding this incident, who advised that based on AG Directive 2000-3, in the absence of criminal complaints or a restraining order being issued, the police department should handle the internal affairs matter. Philip Seidle was placed on administrative leave and referred for fitness for duty evaluations on April 2 and May 29, 2014 that both found him fit for duty. While Tamara Seidle never filed a complaint, Philip Seidle was suspended for 30 days and prohibited for 90 days from overtime assignments "as a result of his behavior towards the responding officers" who answered the call for service at his home.

6. July 11, 2014: On July 11, 2014, Philip Seidle attempted to speak with "two of his children (ages 23 and 16 at the time of [the] incident) at their place of employment." The children did not wish to speak with their father and the NTPD was called. After the incident, Philip Seidle discussed the matter with the Chief of Police and advised him that he wanted to retire. He was instructed to "take sick time to consider his options" and was advised he would need another evaluation if he wanted to return to work. A fitness for duty evaluation conducted on August 18, 2014 concluded that he was fit for duty. According to the MCPO, "[n]o notification to the prosecutor's office was required or made per AG Directive 2000-3."

7. April 29, 2015: On the date in question, Philip Seidle called the NTPD for assistance and claimed Tamara Seidle was violating the parties' visitation order. Superior officers were dispatched to the scene and "Tamara alleged that the police officers should not have responded to the residence and that their presence constituted harassment."

8. January 27, 2012: This incident occurred in Tinton Falls and involved Philip Seidle's "girlfriend" and her daughter, who alleged he "put his hands around her neck and pushed her."

On May 24, 2017, plaintiff submitted an OPRA request to Neptune Township for "copies of the Internal Affairs file(s) on Sgt. Philip Seidle." On June 9, 2017 defendant denied the request and asserted that "[p]olice officers' Internal Affairs files contain their disciplinary history, job performance information, and other confidential personnel documents which the Legislature expressly exempted

from disclosure in OPRA. N.J.S.A. 47:1A-10."[11] Defendant's letter further explained that in addition to "Sgt. Seidle's privacy rights, the privacy rights of other Neptune Township police officers and complainants named in the Internal Affairs records…[t]he requested records are further prohibited from disclosure as provided for in the Attorney General Guidelines governing Internal Affairs files." Finally, defendant provided a Vaughn index that included a general description of each group of records and the reason for the denial.[12] On July 20, 2017 plaintiff filed a complaint for disclosure based

[11] The Custodian's denial provided no explanation regarding why the common law access claim was denied, except to say that:

> "[y]our letter asserts that under the common law, the public's right to Sgt. Seidle's IA records outweighs any 'countervailing governmental need for confidentiality.' You did not provide any legal citation to support that statement, or cite to any case law in which a court ordered that a public employee's personnel records or a police officer's IA filed must (or may) be disclosed to satisfy a public records request under OPRA or the common law."

[12] A "Vaughn index" is a submission "in which the custodian of records identifies responsive documents and the exemptions it claims warrant non-disclosure." North Jersey Media Grp., Ind. v. Bergen Cty. Prosecutor's Office, 447 N.J. Super. 182, 199 (App. Div. 2016). See Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973). Here, the "Vaughn" index describes a total of 682 pages. The documents were listed as follows:

a. March 27, 1994 Internal Affairs Document – 7 pages;
b. June 25, 1994 Internal Affairs Report and accompanying documents – 9 pages;
c. October 10, 1995 Internal Affairs Reports and accompanying documents – 21 pages;
d. March 24, 2001 Internal Affairs Document – 5 pages;
e. May 27, 2004 Internal Affairs Report and accompanying documents – 27 pages;
f. July 22, 2004 Internal Affairs Report and accompanying documents – 15 pages;
g. December 13, 2004 Internal Affairs Report and accompanying documents – 16 pages;
h. February 2, 2005 Internal Affairs Document – 1 page;
i. March 6, 2006 Internal Affairs Document – 2 pages;
j. May 28, 2008 Internal Affairs Report and accompanying documents – 16 pages;
k. February 11, 2010 Internal Affairs Report and accompanying documents – 6 pages;
l. July 7, 2010 Internal Affairs Report and accompanying documents – 3 pages;
m. October 12, 2011 Internal Affairs Report and accompanying documents – 12 pages;
n. February 13, 2012 Internal Affairs Report and accompanying documents – 124 pages;
o. July 11, 2013 Internal Affairs Report and accompanying documents – 24 pages;
p. September 25, 2013 Internal Affairs Report and accompanying documents – 13 pages;
q. November 22, 2013 Internal Affairs Report and accompanying documents – 20 pages;
r. December 18, 2013 Internal Affairs Report and accompanying documents – 16 pages;
s. February 13, 2014 Internal Affairs Report and accompanying documents – 15 pages;
t. February 18, 2014 Internal Affairs Report and accompanying documents – 16 pages;

on OPRA and the common law. On August 28, 2017 defendant filed a motion to dismiss plaintiff's complaint.

On January 22, 2018, the APP published an article titled "Philip Seidle, killer cop: Ex wife 'did not become a victim until I killed her.'" Andrew Ford, *Philip Seidle, killer cop: Ex-wife 'did not become a victim until I killed her,'* Asbury Park Press. Andrew Ford, the author of the article obtained information from several sources, including police reports, the MCPO report, public court documents, and records, and letters submitted by Philip Seidle.

The January 22nd article also uncovered three citizen complaints for excessive force that were filed against Philip Seidle. Mr. Ford revealed that his source for this information was a 2015 federal lawsuit that was "dismissed by a federal judge."[13] According to the article, Police Chief James Hunt testified in a deposition that the department learned of Seidle's problems through "internal affairs investigation[s]." He described "three issues with Seidle at work: one in which he screwed up with evidence, one in which he 'screwed up the readings on a breathalyzer test, causing the department to dismiss a DWI case, and the incident in which he argued with township police officers who responded to a custody dispute between him and Tamara."[14]

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u. April 4, 2014 Internal Affairs Report and accompanying documents – 72 pages;
v. April 9, 2014 Internal Affairs Report and accompanying documents – 33 pages;
w. April 24, 2014 Internal Affairs Report and accompanying documents – 14 pages;
x. April 30, 2014 Internal Affairs Report and accompanying documents – 59 pages;
y. July 22, 2014 Internal Affairs Report and accompanying documents – 22 pages;
z. April 15, 2015 Internal Affairs Report and accompanying documents – 20 pages;
aa. June 26, 2015 Internal Affairs Report and accompanying documents – 6 pages;
bb. May 10, 2016 Internal Affairs Report and accompanying documents – 88 pages.

[13] In October of 2015 Marcia Hayes-Miller filed a federal lawsuit that was dismissed when summary judgment was granted on November 9, 2017.

[14] According to defendant, Chief Hunt's deposition was protected by a confidentiality order but the Federal Court inadvertently posted the deposition for public access.

Despite objecting to the release of his internal affairs records, Philip Seidle proved to be a valuable source for Mr. Ford in writing the article.[15] He wrote Mr. Ford a long letter, spoke with him on the phone and provided him with documents, including records from his divorce and treating psychologist.

Following initial oral argument, the court ordered counsel for defendant to deliver copies of the records for an *in camera* review.[16] The file contains several types of documents including, internal affairs investigative reports, citizen complaints, police and incident reports, fitness for duty evaluations, disciplinary notices and decisions, domestic violence records, and newspaper articles. The documents range in date from March 27, 1994 through May 10, 2016. Of the twenty-eight incidents included in the Vaughn index, only six have not been disclosed to the public. Facts regarding all of the domestic violence incidents included in the Vaughn index have been disclosed by the MCPO. However, the internal affairs file provides far more detail about the previously disclosed events than either the MCPO Review or the APP article. These undisclosed details may provide a basis for discussion regarding whether existing procedures are adequate or whether reforms have gone far enough.[17]

The court consulted counsel regarding its intention to supplement the record with the MCPO report and the APP article.[18] Counsel were also consulted regarding the propriety of inviting the

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[15] At the court's request, defendant contacted Seidle to inquire whether he had an objection to the release of his internal affairs records.

[16] As an initial matter, when the records were delivered to the court, they were not sorted in a manner consistent with the "Vaughn Index." The court made efforts to sort the records, consistent with the Vaughn index. There appear to be discrepancies between the dates in the Vaughn index and the actual dates of the events.

[17] Several documents included in the file do not appear to involve Seidle in any way. These documents can be categorized as disciplinary papers or incident reports relating to other officers.

[18] The parties did not address the MCPO report during the initial oral argument. As a subscriber of the APP who read an account of the report in the newspaper, this court was of the opinion that a

MCPO to intervene as the Prosecutor, as the chief law enforcement officer in the County, presumably has an interest in the issues presented in this case. Counsel agreed, however the MCPO declined to intervene.

In support of the complaint, plaintiff claims that the internal affairs records are not "personnel records" as defined by N.J.S.A. 47:1A:10. In addition, plaintiff argues that N.J.S.A. 47:1A-9 does not exclude the IAPP "guidelines" because while the IAPP may have the "force of law" for police officers, the Legislature excluded only privileges or exemptions recognized by the Constitution, statute, court rule, regulation, judicial case law, Executive Order of the Governor, court order, or resolution of the Legislature in adopting statute. N.J.S.A. 47:1A-9.

Regarding the common law right of access, plaintiff maintains that the "[n]ewspaper as the 'eyes and ears of the public,'" has a significant interest in Seidle's Internal Affairs records. Plaintiff also notes that Seidle had twenty-eight entries in his internal affairs file prior to the death of his ex-wife and argues that public access to the records will force the "Township to confront the question of whether it acted appropriately" when Seidle was allowed to continue on the force and carry a weapon. In addition, plaintiff reasons that disclosure will encourage civilians and officers to "come forward with information regarding police misconduct, [and] promote and enhance, agency self-evaluation." It also stresses that in reviewing the Loigman factors, the court must consider broad policy "considerations favoring confidentiality as they apply to each record requested." Put another way, plaintiff asserts that "[i]f the general policy underlying the asserted need for confidentiality no longer applies to the specific records sought, or is outweighed in a particular instance by the interest of the requester, then there is no basis to withhold access."

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sound disposition of this matter required consideration as much of the information in Seidle's file had already been disclosed.

Finally plaintiff agrees that the court should supplement the record with the APP article and the MCPO report and maintains that waiver applies as the basis of confidentiality no longer exists because "[i]nformation from the internal affairs records has already been publicly disseminated by the Prosecutor in accordance with the Policy." It further notes that "Sgt. Seidle provided the Newspaper with a considerable amount of information that would plainly be the type of information included in the internal affairs files requested by the Newspaper."

In reply, defendant maintains that the records are exempt under OPRA because the IAPP confidentiality provisions have the "force of law." In the alternative, defendant argues that the denial of access is "justified under OPRA's personnel records exemption." Regarding the common law right of access, defendant asserts that disclosure will deter fellow officers from reporting matters to internal affairs if the nature of the complaints and their identities are revealed. Likewise, defendant suggests that the chilling effect may extend to civilians who may fear retaliation in the event that their identities are publically revealed. Finally, defendant argues that the court's attempt to supplement the record is improper and relies on Office of Emplr. Rels. v. Communs. Workers of Am., 154 N.J. 98, 108 (1998) for the proposition that "[o]rdinarily, courts do not raise issues that the parties have not raised."

III.

A.

Access to public records is available in three distinct ways. MAG Entm't, LLC v. Div. of Alcoholic Beverage Control, 375 N.J. Super. 534, 543 (App. Div. 2005) (citing Bergen County Improvement Auth. v. North Jersey Media Grp., 370 N.J. Super. 504, 515 (App. Div. 2004)). Government records may be obtained through a citizen's common law right of access, by the discovery procedures applicable to civil disputes or by asserting one's rights pursuant to OPRA. Ibid.

OPRA was enacted "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of

Hoboken, 196 N.J. 51, 64-65 (2008) (quoting Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). The statute embodies New Jersey's strong tradition of favoring the public's right to be informed of government actions. "Government records" are defined as those enumerated documents that have been "made, maintained or kept on file" if made in the course of official government business. N.J.S.A. 47:1A-1.1.

When a public agency denies a request for records, it "shall have the burden of proving that the denial of access is authorized by law." N.J.S.A. 47:1A-6; see also Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 379 (App. Div. 2003). The agency "must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. Absent such a showing, a citizen's right of access is unfettered." Courier News, 358 N.J. Super. at 382-83. A court's analysis should consider "the overarching public policy in favor of a citizen's right of access." Id. at 383.

While OPRA greatly expanded public access to government records, the statute excludes twenty-one categories of information. Although the personnel records of an individual are not considered government records, "an individual's name, title, position, salary payroll record, length of service, date of separation and the reason therefor, and the amount and type of any pension received shall be a government record." N.J.S.A. 47:1A-10. The information that is precisely covered by the phrase "personnel record" is not defined, however "courts have tended to favor the protection of employee confidentiality." McGee v. Township of East Amwell, 416 N.J. Super. 602, 615 (App. Div. 2010).

In addition to the specifically enumerated exemptions provided for by OPRA, N.J.S.A. 47:1A-9 provides that:

> (a) [t]he provisions of this act … shall not abrogate or erode any exemption of a public record or government record from public access heretofore made pursuant to P.L. 1963, c. 73 …; any other statute; resolution of either or both Houses of the Legislature; regulation

> promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law; federal regulation; or federal order.
>
> (b) [t]he provisions of this act … shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.

Finally, public agencies are required to safeguard information from public access where disclosure would violate a citizen's reasonable expectation of privacy. Burnett v. County of Bergen, 198 N.J. 408, 414, 427-28 (2009) (citing Doe v. Poritz, 142 N.J. 1, 88 (1995); N.J.S.A. 47:1A-1). When confronted with privacy concerns, the court must balance the citizen's interest in privacy with the public's interest in government transparency by considering:

> (1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access.

Burnett, 198 N.J. at 427 (citing Doe 142 N.J. at 88).

B.

The Attorney General, as the chief law enforcement officer of this State, is best suited to provide supervision to all law enforcement agencies and enhance uniformity and efficient enforcement of the criminal law and administration of criminal justice. N.J.S.A. 52:17B-98. To that end, the Attorney General is "charged with adopting guidelines, directives and policies that bind local police departments in the day-to-day administration of the law enforcement process." O'Shea v. Township of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009) (citing N.J.S.A. 52:17B-98).

The IAPP were first published in 1991 "to assist the State's law enforcement agencies with investigating and resolving complaints of police misconduct that originate with private citizens or are generated by supervisors, officers or employees or a law enforcement agency."[19] The IAPP have been revised several times over the last few decades and in the 2014 revisions, the Attorney General characterized the proper administration of the internal affairs function as a "critical issue for the criminal justice system in New Jersey." The Attorney General also stressed the importance of implementing a "meaningful and objective" internal affairs process to mitigate civil liability. Internal Affairs Policy & Procedures, at 46 (citing Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996)), in which the court concluded that a municipality can be held responsible in a suit based on 42 U.S.C. § 1983 if the injury inflicted resulted from an unofficial custom, established by the plaintiff by proving a "course of conduct" or "evidence of knowledge or acquiescence." See also Fletcher v. O'Donnell, 867 F.2d 791 (3d Cir. 1989).

The IAPP are more than recommendations to law enforcement agencies. The 2014 revisions highlight eleven "mandates" that must be implemented by every law enforcement agency "at the Attorney General's direction." Mandate ten, requires the law enforcement agency to issue a public report that summarizes "the allegations received and the investigations concluded," excluding the identities of officers or complainants. Each agency is also required to "periodically release a brief synopsis of all complaints where a fine or suspension of 10 days or more was assessed to an agency member," but the synopsis "shall not contain the identities of the officers or complainants."[20] Mandate ten is consistent with the "Confidentiality" provision included in the "Internal Affairs Records"

[19] NEW JERSEY ATTORNEY GENERAL, Internal Affairs Policy & Procedures, at 3 (1991) (revised Nov. 2017).

[20] Internal Affairs Policy & Procedures, at 5.

section of the IAPP that requires "the nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials" to be confidential.

Based on the Attorney General's broad statutory authority, the IAPP have the force of law and law enforcement entities are required to maintain the confidentiality of internal affairs records. North Jersey Media Grp., Inc. v. Tp. Of Lyndhurst, 229 N.J. 541, 565 (2017) (citing O'Shea, 410 N.J. Super. at 382). However, in 1996, the Legislature adopted N.J.S.A. 40A:14-181 as part of the "Law Enforcement Protection Act" that requires:

> "[e]very law enforcement agency [to] adopt and implement guidelines which shall be consistent with the guidelines governing the 'Internal Affairs Policy and Procedures' of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements."

The floor statement to the bill reveals that the statute was enacted to "clarify and codify certain law enforcement officer powers, protections, privileges and rights."[21] The legislative history indicates that the statute was prompted in part by a report from the Law Enforcement Officers Study Commission ("LEOSC"), which was created in 1995 to "study issues relating to the protection, personal safety and professional well-being of law enforcement officers" in New Jersey. The report documents concerns that criminal defendants had developed a practice of filing civil lawsuits against officers to escape criminal liability.[22] Internal affairs records are routinely requested and provided during discovery for these lawsuits, brought under 42 U.S.C. § 1983, to prove municipal liability.[23]

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[21] Floor Statement to Assembly Bill No. 1836 (June 27, 1996).

[22] General Assemb., Law Enforcement Officers Study Comm'n Final Report, at 10 (1995). Ibid.

[23] The statute provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,

Ibid. The LEOSC's final report concluded that labor and management were concerned with disciplinary actions, and internal investigations procedures and observed that Attorney General standard operating procedures, designed to address these concerns, were not adopted by all law enforcement agencies. The Fraternal Order of Police ("FOP") offered testimony before the Commission and recommended statutory changes that required all law enforcement agencies to "adopt and follow any Standard Operating Procedure promulgated or issued by the Attorney General" or lose its protection under the New Jersey Tort Claims Act.

C.

In addition to OPRA, disclosure of public records can be sought under the common law right of access. A requestor may gain access to records under the common law if: (1) the records are common-law public documents; (2) the requestor establishes an interest in the material; and (3) the citizen's right to access outweighs the State's interest in confidentiality. Keddie v. Rutgers, 148 N.J. 36, 49 (1997). Under the common law, a record is a "public document" if it is "created by, or at the behest of, public officers in the exercise of a public function. Id. at 50 (citing Higg-A-Rella v. County of Essex, 141 N.J. 35 (1995)).

As part of the common law analysis, each trial judge must engage in an "exquisite weighing process" that considers the interests of the parties and the specific materials requested. Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984); see also Piniero v. New Jersey Div. of State Police, 404 N.J. Super. 194, 206-07 (App. Div. 2008) (quoting McClain v. College Hospital, 99 N.J. 346, 361 (2008)).

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except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Colombia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

Factors to consider when balancing the respective interests include:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Loigman, 102 N.J. at 113.]

D.

The courts and the Legislature have recognized certain privileges including the psychologist privilege, physician-patient privilege, newsperson's privilege, cleric-penitent privilege, and attorney-client privilege. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 546 (1997). However, the New Jersey Supreme Court has declined to adopt the "privilege of self-critical analysis" which exempts from disclosure deliberative and evaluative components of an organization's confidential materials. See Payton, 148 N.J. at 545, in which the Court observed the "disfavored status of privileges" and opted for an approach that recognizes the importance of confidentiality as part of a judge's "exquisite weighing process," citing Loigman, 102 N.J. at 107 (quoting Beck v. Bluestein, 194 N.J. Super. 247, 263 (App. Div. 1984)).

E.

Pursuant to N.J.S.A. 2A:84A-29, "a person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person… without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." N.J.S.A. 2A:84A-29(b). Voluntary disclosure

pursuant to an OPRA request waives whatever right the government body may have to deny a request on the grounds that it was improper. See Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205, 213 (App.Div.2005). However, inadvertent disclosure may not result in waiver. Kinsella v. NYT Television, 370 N.J. Super. 311, 316-18 (App. Div. 2004). Although a specific test has not been adopted to determine whether the inadvertent disclosure of privileged materials results in waiver, courts have utilized three different approaches. Ibid. When applying the "strict" approach, inadvertent disclosure always results in waiver. Id. at 317. Conversely, when applying the "subjective intent" approach, inadvertent disclosure never results in a waiver unless the party protected by the privilege intended to waive it. Ibid. Finally, courts have also applied a "balancing test" to determine whether inadvertent disclosure constitutes waiver. Applying this approach, courts consider:

> (1) the reasonableness of precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interest of justice would or would not be served by relieving the party of its error.

Id. at 317 (quoting Ciba-Geigy Corp. v. Sandoz Ltd., 916 F.Supp. 404, 411 (D.N.J.1995)).

IV.

Defendant's denial based on the IAPP and N.J.S.A.47:1A-9 is based on a "statutorily recognized basis of confidentiality." See O'Shea, 410 N.J. Super. at 382, holding that Attorney General guidelines and directives have the "force of law."[24] The court's interpretation is consistent with the Legislature's intent, gleaned from the floor statement of Assembly Bill A1836 and the legislative

[24] While O'Shea considered whether Use of Force Reports ("UFR") were exempt from access under OPRA, the court reasoned that UFRs would be considered "confidential" and exempt from public access if the IAPP had included a "particularized inclusionary provision" regarding the confidentiality of UFRs. O'Shea, 410 N.J. Super. at 385. There is no question that this "particularized inclusionary provision" was included in the IAPP for Internal Affairs Records.

history. See Merin v. Maglaki, 126 N.J. 430, 436 (1992), holding that "[t]he primary task for the Court is to effectuate the legislative intent in light of the language used and the objects sought to be achieved," citing State v. Maquire, 84 N.J. 508, 514 (1980).[25]

Plaintiff argues that "guidelines" are not exempt because they were not specifically mentioned in the statute. However, the legislative history of N.J.S.A. 40A:14-181, adopted in 1996, reveals the Legislature intended to codify the IAPP, including the provision regarding the confidentiality of internal affairs records.

The IAPP are more than recommendations or suggestions to law enforcement agencies, they establish mandates that bind police departments across the State. Internal Affairs Policy & Procedures. Prior to adoption of the statute, the Attorney General required law enforcement agencies to adopt the IAPP by way of Attorney General Directive. However, the report from the LEOSC reveals that the "[C]omission was advised that not all law enforcement agencies adopt the Attorney General's SOP's." General Assemb., Law Enforcement Officers Study Comm'n Final Report, at 18. The FOP offered testimony at the Commission hearings and was concerned that criminal defendants were filing civil lawsuits to access internal affairs records as leverage in their criminal cases. Id. at 2. The report's findings and recommendations also underscore the importance of implementing the internal affairs function to mitigate civil litigation by identifying, monitoring and correcting police misconduct when it occurs. Id. at 18, 19. See also Internal Affairs Policy & Procedures, at 3, in which the Attorney General comments that the legislation "recognized the importance of the internal affairs function" with the purpose to protect private citizens, mitigate civil liability and bolster criminal prosecutions. Consequently, this court can only conclude that the Legislature intended to bestow the *imprimatur* of

[25] The statute required law enforcement agencies to adopt guidelines consistent with the IAPP that were also "consistent with any tenure or civil service laws" and that did not "supersede any existing contractual agreements."

statutory authority on the IAPP and the confidentiality provisions of Internal Affairs Records by adopting the statute. Because the confidentiality requirement of Internal Affairs Records was codified by statutory mandate, it is a recognized exemption under OPRA. N.J.S.A. 47A:1-9.[26] [27]

Despite this court's conclusion that the internal affairs records are excluded by OPRA, the statute does not limit the common law right to access records. Mason, 196 N.J. at 67. Plaintiff has met the first two requirements to establish a common law right of access. Because the IAPP required the NTPD to create and maintain Seidle's Internal Affairs Records they are public documents under the common law. In addition, the plaintiff, as a newspaper, has an interest "in keeping a watchful eye on the workings of public agencies." S. N.J. Newspapers v. Twp. of Mt. Laurel, 141 N.J. 56, 71 (1995) (citing Red Bank Register, Inc. v. Board of Educ., 206 N.J. Super. 1, 9 (App. Div. 1985)). The particular facts of this case require the court to balance what are essentially competing public interests of confidentiality and disclosure. Consequently, the court's attention is directed to the last requirement that requires the court to balance the plaintiff's interest in access against the public interest in confidentiality. Loigman, 102 N.J. at 104. Consistent with jurisprudence regarding the common law right of access, this court's deliberations "must be concretely focused upon the relative interests of

[26] Defendant's brief did not cite Spinks v. Township of Clinton, which held that despite the provisions of N.J.S.A. 40A:14-181, internal affairs records filed with the court were not the type of court records typically protected from public access. 402 N.J. Super. 454, 461 (2008) (citing Hammock by Hammock v. Hoffmann-Laroche, 142 N.J. 356 (1995)). Spinks is distinguishable from the case at bar because the Internal Affairs Records at issue were filed with the court as part of the litigation. The court noted that there is a "presumption of public access to documents and materials filed with a court in connection with civil litigation." Id. at 460. The converse is true for discovery documents, which remain "confidential until such time as they are filed with the court." The case at bar does not involve court records voluntarily filed with the court as part of litigation, but records which have been deemed confidential by the Attorney General, pursuant to his/her statutory authority. Finally, Spinks was decided before the Court's decision in North Jersey Media, which adopted the court's holding in O'Shea, that Attorney General Guidelines have the "force of law."

[27] Because the court has concluded that OPRA exempts these records, a review of the Doe factors is unnecessary.

the parties in relation to the specific materials requested." Piniero v. New Jersey Div. of State Police, 404 N.J. Super. 194, 206-07 (App. Div. 2008) (citing McClain, 99 N.J. at 361). In other words, general policy considerations for or against disclosure are insufficient to support a reasoned decision in this matter. Particular attention must be given to the records and facts that relate to **this** case. Piniero, 404 N.J. Super. 194.

Disclosure will not discourage citizens and officers from reporting information or chill agency self-evaluation, program improvement or other decision making. The murder of Tamara Seidle, the mother of nine children received widespread media attention. Rumors regarding the Seidles' history of domestic violence resulted in a public outcry by citizens who questioned how such a tragedy could have occurred at the hands of a police officer. These unique facts support plaintiff's argument that its interest in disclosure outweighs the public's interest in the confidentiality of Seidle's records.[28]

There can be no doubt that important public policy considerations favor confidentiality of internal affairs records. Defendant maintains that disclosure would discourage citizens from reporting misconduct and obstruct the purpose of the IAPP, which is to "enhance the integrity of the State's law enforcement agencies…[by]…assur[ing] the citizens of New Jersey that complaints of police misconduct are properly addressed." Advocates in favor of confidentiality also reason that disclosure would have a chilling effect on fellow officers' willingness to "report on a colleague's errors, misconducts or crimes." Katherine J. Bies, Note, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, 28 STAN. L. & POL'Y REV. 109, 115 (2017). Still others have suggested that the details included in these files could erode public confidence in officers, the presence of which is critical to an officer's "effectiveness on the beat" and overall public safety. Id. at 116. Finally, many argue that disclosure violates the privacy rights of

[28] The court stresses that this court's ruling on the common law right of access is limited to the facts of this case.

officers and encourages criminal defendants to gain access to these records in an effort to "escape liability for themselves or seek financial gain." Ibid. In fact, it was this concern, articulated by the FOP that prompted the Legislature to adopt N.J.S.A. 40A:14-181. See Law Enforcement Officers Study Commission, Final Report, October 26, 1995, at 9-10, noting that a

> "spokesmen for the Fraternal Order of Police supplemented their earlier suggestions concerning the adequacy of statutory protections and immunities afforded New Jersey's law enforcement officers. Included among their suggestions were: (1) a proposal to require that in instances where an accused offender institutes a countersuit against the arresting officer, the criminal case is heard first…and (3) a proposal which would require each municipality to adopt all Attorney General promulgated law enforcement policy guidelines by providing that a municipality which fails to adopt them may be held liable in an action involving a matter covered by an unadopted guideline."

Despite these compelling reasons, the court cannot ignore that facts regarding many of Seidle's internal affairs incidents have already been disclosed to the public. The Monmouth County Prosecutor, as the chief law enforcement officer, exercised his right to release information included in Seidle's confidential records. Likewise, Seidle voluntarily provided information from his internal affairs file to the APP and waived any claim that the information is private. As the Loigman Court concluded, "[a]s the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification." Loigman, 102 N.J. at 103 (citing McClain, 99 N.J. at 362).

There is nothing about the nature of the internal affairs incidents or the manner in which they were reported, that would lead this court to conclude that disclosure of part or all of the records would deter citizens or fellow officers from reporting police misconduct. To the extent that an internal affairs investigation was prompted by a citizen complaint, there is no indication that the citizen came forward on the condition that his/her identity would not be revealed. In addition, none of the internal affairs incidents were initiated by an officer who reported Seidle's alleged misconduct on the condition that his/her identity be kept secret. It is fair to say that some

incidents, several of which were disclosed in the Asbury Park Press article, were initiated by supervisors after performance issues were brought to their attention. To the extent that the identities of officers who either investigated incidents or provided information is included in the records, this information can be redacted to protect the integrity of, and relationships among, officers in the department.

To be sure, a blanket policy favoring disclosure would chill the ability of any particular police agency to investigate complaints, engage in "self-evaluation" and maintain the public's confidence in law enforcement. However, the likely harm that could result from disclosure of these records is minimal because much of the information included in the file is already in the public domain. Any harm can be mitigated by redacting information that could reveal the identities of witnesses or complainants. With appropriate redactions, the public's interest in confidentiality does not outweigh the public's interest in disclosure.

The records in question do not include any factual data to be used for analysis. Nor do they include "evaluative reports of policymakers" in the traditional sense that these records are defined.[29] The records contain "purely factual" information, typically not protected because it does not reveal the "nature of the decision making process." Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274, 299 (2009).

Based on the record before the court, it is unclear whether concerns that arose from the murder of Tamara Seidle have been sufficiently addressed by remedial measures instituted by the

[29] See Education Law Center v. New Jersey Dept. of Educ., 198 N.J. 274, 299 (2009), in which the Court made a distinction between factual data and reports that contain opinions of "policy makers." In this context, "evaluative reports of policy makers" can be defined consistent with jurisprudence regarding the "deliberative process privilege" as defined under the Freedom of Information Act ("FOI") and OPRA. These reports are defined as those that are "part of a process leading to formulation of an agency's policy decision."

MCPO[30] or Attorney General.[31] As the Monmouth County Prosecutor's public comment on June 30, 2016 reveals "while the law enforcement response to this matter had its flaws in some regard, none of them caused the death of Tamara Seidle. Philip Seidle did." However, the court cannot ignore that the public is entitled to answers regarding how an officer with twenty-one (21) police involved reports of conflict with his wife, could remain on the police force, armed with a weapon that was used to murder his ex-wife.

Hindsight is twenty-twenty vision and based on the facts before the court, this tragedy should not be used to cast blame or disparage the actions of anyone other than Philip Seidle. However, any honest dialogue on reforms may be one important step to saving lives in the future. The Monmouth County Prosecutor acknowledged that the law enforcement response in the Seidle matter had "flaws in some regard." His office implemented an "Early Warning System" in Monmouth County to provide both employing agencies and the MCPO an "opportunity to intervene before such an officer places others or themselves in harm's way." However, the public has a right to inquire whether existing policies were in place to adequately address officers at risk or whether recent reforms or policies have gone far enough.

The Risk Management Procedures section of the IAPP encourages law enforcement agencies to implement an "early warning system" to "track employee behavior." On December 10, 2009, Attorney General Anne Milgram issued a Model Policy for "Handling of Domestic Violence Incidents Involving Law Enforcement Officers." This policy is included as Attachment Q to the 2014 revisions of the IAPP and includes a comprehensive early warning system that details "intervention responsibilities." The court notes that "actions or behaviors" to be monitored

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[30] Monmouth County Prosecutor's Office, Early Warning System, June 29, 2016.

[31] Attorney General, Statewide Mandatory Early Warning Systems, Law Enforcement Directive No. 2018-3, March 20, 2018.

included in the Early Warning System recently adopted by the MCPO are identical to many of those suggested in the Model Policy issued in 2009. However, some behaviors suggested in the Model Policy were not included in the MCPO policy, including the nature and extent of "verbal disputes," "unwarranted aggression or verbal abuse," and "deteriorating work performance." More importantly, it is not clear if the Office of Attorney General had a policy to track implementation of the Model Policy. Consistent with plaintiff's argument, a compelling case can be made that examination of the facts in this case could lead to necessary statewide reforms to address officers at risk. Finally, because Philip Seidle has already plead guilty and will remain in prison for decades, disclosure will not interfere with any investigative or disciplinary proceedings.

On the issue of counsel fees, plaintiff is entitled to some award of fees because the records would not be disclosed, but for this court's decision. However, the court notes that there was no bright line legal standard to guide defendants in their decision to deny access. The court's decision required a tedious analysis of facts after reviewing the records *in camera*. Because defendants prevailed on the OPRA issue, only a partial award of fees would be fair and appropriate.

CONCLUSION

Because disclosure is required by the common law right of access, plaintiff's claim for counsel fees is granted. The parties shall confer and attempt to resolve the reasonable attorney's fees to which plaintiffs are entitled. If counsel cannot come to an agreement, plaintiffs' counsel shall submit a Certification of Services delineating the amount of attorney's fees requested. Plaintiffs' counsel, Thomas J. Cafferty, Esq., shall prepare and submit under the five-day rule, R. 4:42-1, an order that comports with this court's ruling, and if necessary, the Certification of Services delineating the amount of attorney's fees requested.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy

973-854-1714
ashalom@aclu-nj.org

July 26, 2021

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-58-20, *Richard Rivera v. Union County Prosecutor's Office* (084867), Appellate Division Docket No. A-2573-19T3

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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Preliminary Statement

The Appellate Division utilized an improper process to evaluate Plaintiff's request under the common law right of access to public information, and that improper process produced incorrect results.

Rather than remanding the case to create the required record, the intermediate appellate court engaged in speculation about what the records *might* contain and the harm that *could* flow from their release. The court made categorical assumptions about an entire class of documents, without a record to determine whether the documents sought in this case fit the archetype of records that must remain confidential. (Point I).

That process error is reason enough to reverse the judgement of the Appellate Division. But here, the process error also produced a results error: although in many cases there is a good reason to preserve the confidentiality of internal affairs records, in this case, the public's interest in knowing the details of a law enforcement executive's use of racist and sexist epithets outweighs the need for secrecy. (Point II). The court below gave too much weight to the need for secrecy (Point II, A) and insufficient weight to the need for transparency. (Point II, B).

The Attorney General's *Internal Affairs Policy and Procedure (IAPP)* mandates – in most instances – that law enforcement agencies treat internal affairs

files as confidential. Whatever impact that policy has on analysis under the Open Public Records Act, it cannot bind courts in evaluating common law claims. (Point II, A, 1). The circumstances of this case illustrate why reliance on a general interest cannot alone determine results of a common law balancing test. Although the existence of an Attorney General policy cannot determine the result, the rationale animating the policy should certainly inform a court's analysis. But here, the panel below looked only at the IAPP's concern with releasing the identity of internal affairs complainants without considering whether – under the peculiar facts of this case – the records could be released (perhaps in a redacted form) without divulging the identity of those who cooperated in the investigation. (Point II, A, 2).

This was no ordinary case. At issue were accusations that the police director in New Jersey's fourth largest city, a white man running a police department in a city that is more than eight-five percent non-white, used racist and sexist slurs to describe people who worked for him. Allegations like that impact not only the police department, but the entire city. And given the recent attention on race-based policing, the eyes of the entire state were focused on the City of Elizabeth. No law enforcement agency – or any entity, in fact – can be expected to root out discrimination in its practices if courts permit the agency to obscure the racist and sexist conduct of its leaders. The opinion below fails to acknowledge the important bases for Plaintiff's request. (Point II, B).

For these reasons, unless the Court finds a right of access under OPRA, a remand is appropriate to build a proper record and conduct the required balancing of interests.

Statement of Facts and Procedural History

Amicus American Civil Liberties Union of New Jersey relies on the Statement of the Matter Involved contained in Plaintiff/Petitioner's Petition for Certification, adding that the Court granted the Petition on May 14, 2021.

Argument

I. Appellate courts cannot conduct the balancing test required under the common law right of access to public information without a robust record.

When courts evaluate claims of access under the common law they must answer three questions: 1) whether the records are common law public documents; 2) whether the person seeking access has an interest in the subject matter of the material; and 3) whether the requester's interest outweighs the government's interest in preventing disclosure. *Keddie v. Rutgers, State Univ.*, 148 N.J. 36, 50 (1997). Two of these questions are not in dispute in this case; Defendants do not appear to contest, and the Appellate Division properly held, that the requested documents are public documents and Plaintiff Rivera has an interest in them. *Rivera v. Union Cty. Prosecutor's Off.*, No. A-2573-19T3, 2020 WL 3397794, *11 (App. Div. June 19, 2020). The common law claim, then, turns on whether the

Plaintiff's interest outweighs the government entities' interest in non-disclosure. *Educ. L. Ctr. v. New Jersey Dep't of Educ.*, 198 N.J. 274, 303 (2009).

Courts evaluating common law claims consider a series of factors set forth in *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), but they do so only when a sufficiently robust record has been developed. Where cases reach appellate courts without enough information – on either side of the ledger – the court should remand the case for additional factual development. *See*, *e.g.*, *Paff v. Ocean Cty. Prosecutor's Off.*, 235 N.J. 1, 30 (2018) (remanding case to trial court to address common law right of access claim); *Gilleran v. Twp. of Bloomfield*, 227 N.J. 159, 177 (2016) (explaining benefit of analyzing request for security footage under common law, but ordering remand because no balancing of interests had been performed); *S. New Jersey Newspapers, Inc. v. Twp. of Mt. Laurel*, 141 N.J. 56, 72 (1995) (finding record regarding public purpose insufficiently developed to allow meaningful balancing, and therefore remanding); *S. Jersey Pub. Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 498 (1991) (remanding to the trial court to balance interest in confidentiality against the public interest in disclosure); *Drinker Biddle & Reath LLP v. New Jersey Dep't of L. & Pub. Safety, Div. of L.*, 421 N.J. Super. 489, 501 (App. Div. 2011) (remanding case to trial court for balancing of interests).

Rather than order a remand to allow the development of a record, the Appellate Division endeavored to conduct the analysis on its own – without the benefit of a record that would reveal either Plaintiff's interest in obtaining the documents or the specific reasons that the Defendant law enforcement agencies sought to prevent disclosure of the documents. As a matter of basic logic, a court cannot balance interests if it does not know the weight to be assigned to one side of the scale. *Cf. State v. Szima*, 70 N.J. 196, 201 (1976) (critiquing lower court's application of speedy trial balancing test when it failed to consider information about one side). Indeed, as the Appellate Division explained more than three decades ago: "A trial court is better able than an appellate tribunal to . . . balance the parties' interests when that must be done to determine whether there is a common-law right of access." *Philadelphia Newspapers, Inc. v. State, Dep't of L. & Pub. Safety, Div. of State Police*, 232 N.J. Super. 458, 466 (App. Div. 1989). Where, as here, an appellate court does not have sufficient information about *either* side of the equation – having received *no* evidence that had been provided on the issue – the task of balancing cannot be accomplished.

II. The Appellate Division made critical errors in its analysis of the balancing test required under the common law right of access to public information.

Even on the paltry record presented to the Appellate Division, the court made errors regarding the weight to be assigned to each side of the ledger.

A. The Appellate Division gave too much weight to the need to maintain the confidentiality of internal affairs reports.

Although the trial court did not develop any record on the common law claim, the Appellate Division relied on the IAPP to hold that the law enforcement agencies could maintain the secrecy of the internal affairs report. Courts can properly consider agency regulations (similar to the IAPP), but the existence of regulations disfavoring disclosure alone cannot end the inquiry.

1. The court improperly treated the Attorney General's policy position as dispositive of the common law inquiry.

Plaintiff's Petition for Certification contended that "[n]o reasonable person would argue that the AG could simply issue a policy tomorrow with a long list of records he considers to be exempt and instructing subordinate law enforcement agencies to withhold them. The AG lacks any such authority." P.Cert. at 3.[1] That must be true. If the Attorney General had that power, the seminal case on the common law right of access to public information, *Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986), would have been unnecessary. In that case, the Attorney General sought a court determination that it could withhold an investigative audit of a prosecutor's office. *Id.* at 101. If Attorney General directives could exempt records from public view, the Attorney General could have simply issued a

[1] P. Cert. refers to Plaintiff's Petition for Certification.
Eliz. Opp. Cert. refers to the City of Elizabeth's Brief in Opposition to Plaintiff's Petition for Certification.

directive doing just that and avoided litigation. Indeed, Defendant City of Elizabeth conceded as much in its opposition to Certification. Eliz. Opp. Cert. at 7.

An administrative agency can exempt a record from disclosure under the Open Public Records Act (OPRA) by promulgating a regulation under the authority of a statute or executive order. N.J.S.A. 47:1A-1. Whether Attorney General directives like the IAPP can achieve the same result *under OPRA* does not resolve whether the Attorney General can categorically exclude documents from public access *under the common law* by issuing a directive. As the Court has explained, in evaluating common law questions, courts look to the common law rather than to New Jersey statutes. *Higg-A-Rella, Inc. v. Cty. of Essex*, 141 N.J. 35, 50–51 (1995). Under the common law, the Court has been clear:

> The existence of a regulation is not dispositive of whether there is a common-law right to inspect a public record, but it weighs "very heavily" in the balancing process as a determination by the Executive Branch of the importance of confidentiality. In the context of [OPRA's predecessor,] the Right–to–Know Law, such regulatory exemptions preempt the balancing of the interests and preserve confidentiality on a categorical basis. That approach is not appropriate under the common law, where "the focus must always be on 'the character of the materials sought to be disclosed.'"
>
> [*Home News v. State, Dep't of Health*, 144 N.J. 446, 455 (1996) (internal citations omitted).]

The Appellate Division needed to look beyond the existence of Attorney General guidance.

2. The court below focused exclusively on the generalized need to maintain confidentiality, without considering the particular facts of this case where the identity of complainants might be able to be protected.

The Appellate Division focused too much on the general category of documents at issue (internal affairs records) and failed to be "sensitive to the fact that the requirements of confidentiality are greater in some situations than in others." *Id.* (quoting *McClain v. Coll. Hosp.*, 99 N.J. 346, 362 (1985)). The Court has consistently recognized the need for case- and document-specific inquiries as part of the common law balancing test. *See*, *e.g.*, *Paff v. Ocean Cty. Prosecutor's Off.*, 235 N.J. 1, 28 (2018) (reminding litigants to create a fact-specific record regarding privacy objections for OPRA and common law claims); *Higg-A-Rella*, 141 N.J. at 49 (explaining that "our holding is fact-specific, and may not be generalized to all cases in which people seek computer copies of common-law public records"); *Atl. City Convention Ctr. Auth. v. S. Jersey Pub. Co.*, 135 N.J. 53, 60 (1994) (requiring courts to engage in a balancing process "concretely focused upon the relative interests of the parties in relation to [the] specific materials"); *McClain v. College Hosp.*, 99 N.J. 346, 361(1985) (same).

No such case-specific inquiry happened here. Instead, the court determined that "[b]ecause the complainants and witnesses are members of the [Elizabeth Police Department], their statements disclosing the racist and sexist slurs that Cosgrove uttered, and his other discriminatory actions, would likely disclose their

identity or narrow the field to only a few individuals, even if all personally identifiable information is redacted." *Rivera*, 2020 WL 3397794, at *8. But without reviewing the actual records, the court had no basis for that conclusion. Of course, if Cosgrove had a private conversation with Officer A in which he disparaged Officers B and C, there would be no way to reveal that Cosgrove had used slurs to reference Officers B and C without outing Officer A as the complainant. On the other hand, if Cosgrove aimed slurs at his subordinates during a rollcall meeting of the entire department (or any large subset of the department), and the court redacted the identity of the actual complainant, Plaintiff could receive the document without compromising the anonymity of those who participated in the internal affairs process.

Indeed, all internal affairs documents require this sort of individualized analysis to determine whether the laudable goal of protecting the identity of complainants requires the non-disclosure of the records. Imagine, for example, a complaint about an officer beating a suspect. Revealing the internal affairs reports might identify the victim as the source of the complaint. But in some cases, extrinsic evidence – like surveillance videos or body-worn camera footage – might provide a basis for a complaint that does not require initiation by a complainant. This is exactly the sort of individualized determination the Court recommended in *Paff v. Ocean Cty. Prosecutor's Off.*:

> [T]he driver's privacy interest did not warrant the [office]'s decision to withhold recordings from disclosure in this case. [But i]n other settings, a third party's reasonable expectation of privacy may warrant withholding a record from disclosure. . . . For example, if a sexual assault or similar crime were recorded by [a mobile video recorder (MVR)], the victim would have a compelling objection to the disclosure of that recording, even in redacted form. In other circumstances, the blurring of a victim's face or other methods of redaction prior to disclosure of an MVR recording may resolve a privacy concern.
>
> [235 N.J. at 28.]

The Appellate Division's cramped view of what redaction could achieve and what would necessarily be revealed by the production of internal affairs files led it to improperly analyze only the government's interest in secrecy. By failing to allow Plaintiff to create a record regarding the need for the document, the court deprived itself of the chance to properly weigh the other side of the balance.

B. The Appellate Division failed to appreciate the importance of public knowledge about racism and sexism in policing.

The Appellate Division's analysis contains no consideration of the ways that transparency in police discipline – even when police executives have acted in racist and sexist ways – builds public confidence in police and policing. A "see no evil, hear no evil" approach to policing will not fool members of the public into thinking that police departments are operating without racism or sexism. In 2017, only 57 percent of Americans reported having "quite a lot" or "a great deal" of

confidence in police. Congressional Research Service, *Public Trust and Law Enforcement: A Discussion for Policymakers* (Dec. 13, 2018), Page 2, Table 1. Among Black Americans, that number drops to a mere 30 percent. *Id*. Indeed, even before the murder of George Floyd, a large majority (60 percent) of Americans believed that deadly encounters between Black people and police officers were signs of broader issues in police departments. Rick Morin, et al. *Police Views, Public Views*, Pew Research (Jan 11, 2017).[2] The perception is particularly grim in the Black community, with 79 percent of respondents saying fatal encounters are a sign of a broader issue. *Id.*

Less information about misconduct does not build confidence. An "absence of public information [about discipline] allows negative perceptions, and the belief that the police generally are not responsive to the complaints[,] to fester." U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices* (Nov. 2018) at 61.

Distrust of police comes with profound consequences. Community trust "is the key to effective policing" and the lack of it undermines the ability of police officers to do their jobs successfully. *See* International Association of Chiefs of Police, *Building Trust Between the Police and the Citizens They Serve*, 7 (Jan.

[2] *Available at* https://www.pewresearch.org/social-trends/2017/01/11/police-views-public-views/.

2014). Where the public cannot learn about disciplinary action, it cannot serve its vital role as a "check" on government. *See Worcester Telegram & Gazette Corp v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003) ("A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights."); *Welsh v. City & Cty. of San Francisco*, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("The public has a strong interest in assessing . . . whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.").

The fact that Director Cosgrove resigned – after much delay – does not obviate the need for the public to learn about the contents of the internal affairs investigation. Members of the public have a right to know whether Cosgrove was investigated appropriately. They want to know why the Mayor stalwartly defended Cosgrove against "character assassination." Ali Watkins, *Police Director in New Jersey Resigns After Inquiry Finds He Used Racist and Sexist Slurs*, N.Y. Times (Apr. 29, 2019).[3] They want to know whether large swaths of the Elizabeth Police

[3] *Available at* https://www.nytimes.com/2019/04/29/nyregion/elizabeth-police-racism-james-cosgrove.html.

Department sat silently as its leader disparaged women and people of color who worked for him.

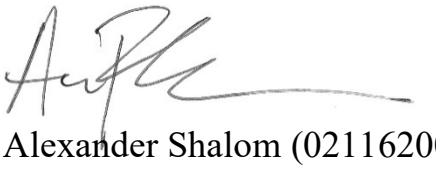
Broad distrust of police officers, particularly in communities of color, will not abate if law enforcement asks the public to simply trust that it has properly addressed racist misconduct among its leaders. After all, "[s]unlight is the greatest disinfectant when the government acts in dark corners." *Paff*, 235 N.J. at 34 (Albin, J., dissenting) (*citing Buckley v. Valeo*, 424 U.S. 1, 67 (1976), (*quoting* Louis Brandeis, *What Publicity Can Do, in Other People's Money and How the Bankers Use It* 62 (National Home Library Foundation ed. 1933)).

Justice Albin explained that "[t]he public – particularly marginalized communities – will have greater trust in the police when law enforcement activities are transparent. . . " *Paff*, 235 N.J. at 36 (Albin, J., dissenting). The Appellate Division wholly ignored that benefit when it attempted to balance the competing interests, without reviewing the actual records or allowing Plaintiff to explain his interest in obtaining them.

Conclusion

Because the court below erred in both the process and the result of the common law analysis, unless the Court reverses the Appellate Division's decision regarding OPRA, it should remand the case to the Law Division to allow Plaintiff to explain the need for the documents and allow the Court to conduct an *in camera* inspection of the requested records.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, NJ 07102
(973) 854-1714
ashalom@aclu-nj.org

RICHARD RIVERA, Plaintiff-Petitioner, v. UNION COUNTY PROSECUTOR'S OFFICE and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office, Defendant-Respondents, and CITY OF ELIZABETH, Defendant-Intervenor-Respondent.	SUPREME COURT OF NEW JERSEY Docket No. 084867 Civil Action On Certification From: Superior Court of New Jersey, Appellate Division Richard J. Geiger, J.A.D. Arnold L. Natali, Jr., J.A.D.

BRIEF AND APPENDIX OF PROPOSED *AMICI CURIAE* ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AND NEW JERSEY STATE OFFICE OF THE PUBLIC DEFENDER

Lawrence S. Lustberg (023131983)
Michael R. Noveck (901172012)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Counsel for Amici Curiae

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PRELIMINARY STATEMENT

The issue before the Court is whether a public records requester can ever obtain access to police internal affairs ("IA") records. The Appellate Division held that such access is unavailable under both OPRA and the common law right of access. As explained below, that ruling threatens to undermine the fairness of the criminal justice process and its search for the truth by preventing the discovery and use of exculpatory and impeachment evidence that is not only highly relevant in criminal trials, but also must be disclosed as a matter of constitutional imperative. Accordingly, the Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") and the New Jersey State Office of the Public Defender ("OPD"; collectively, "*Amici*") respectfully submit this brief *amici curiae* to urge the Court not to bar public access to IA records.

The disclosure of such records is critical to the criminal justice process, because criminal cases very frequently hinge on the credibility of police witnesses. Did the accused defendant actually possess drugs, or was the contraband planted by cops? Was the defendant resisting arrest, or was he subjected to police brutality? Did the police officer properly arrange the eyewitness identification procedure, or did he commit an error that violated the rules and thus risked a wrongful identification? Allegations of police misconduct can be relevant either as directly exculpatory evidence showing that the defendant did not commit the crime charged, or as impeachment evidence impugning the credibility of

the often critical police officer witness's account of the events. Indeed, there are numerous examples of such evidence resulting in criminal cases being resolved in a defendant's favor –- either through a prosecutor's decisions not to charge or to dismiss the case; an acquittal at trial; or the reversal of a conviction, based on an appeal or an application for post-conviction relief.

Police misconduct of the sort that yields such results is frequently investigated by the IA units of the officer's police department. Yet even though evidence of misconduct, relevant to a criminal matter, may well be uncovered during those investigations, it is kept confidential, and under the Appellate Division's decision in this case, is completely inaccessible to the defense, or any other member of the public. In fact, relevant IA evidence is even kept confidential from prosecutors. Thus, in spite of clear constitutional law requiring disclosure of exculpatory and impeachment evidence, as well as this State's broad, open-file criminal discovery rules, IA records are nonetheless not disclosed to defendants and their attorneys.

Public records requests of the type at issue in this case can help fill these gaps in disclosure of such crucial evidence of police misconduct. Thus, in other states -– including California, Florida, and Georgia -– where IA files are subject to broader public access, criminal defense lawyers and newspaper reporters have effectively utilized public records to uncover previously undisclosed evidence of police misconduct, resulting in dismissals of criminal cases and acquittals of criminal defendants. Such

public access is consistent with this State's proud history of transparency in public records, which is designed to root out governmental misconduct and reveal the truth behind government institutions, and with the State's broad criminal discovery rules supporting truth-seeking and fairness in the criminal justice system.

Amici therefore participate in this appeal to support Petitioner's position regarding public access to IA records. *Amici* respectfully urge the Court to reverse the Appellate Division decision, which runs contrary to this Court's precedent in favor of transparency, particularly with respect to matters relevant to criminal cases, by restricting all access to IA files. In fact, a separate Appellate Division panel, in a published opinion, recently ruled that IA files can, in appropriate cases, be subject to disclosure as a result of a public records request. *Amici* endorse this approach and ask the Court to permit public disclosure of IA records, especially when they are relevant to the defense of a criminal matter.

INTEREST OF *AMICI CURIAE*

Amici participate in this case in order to explain to the Court, as they did in *In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, --- N.J. ---, 2021 WL 2303462 (June 7, 2021), the salutary impact that disclosure of IA records in response to a public records request will have on the capacity of the criminal justice system to achieve fair and accurate results, particularly because such public access will allow criminal defendants and their

attorneys to effectively test the credibility of police officer witnesses who have engaged in previous acts of misconduct. *Amici* thus seek to "assure that all recesses of the problem will be earnestly explored." *See Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965). *Amici*'s participation is particularly appropriate because this is a case with "broad implications," *Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 17 (1976), in which *Amici*'s "participation will assist in the resolution of an issue of public importance." *R.* 1:13-9.

Amicus curiae ACDL-NJ is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitution; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good[.]" *ACDL-NJ By-Laws*, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders.

Over the years, the ACDL-NJ has participated as *amicus curiae* in numerous cases in this Court and in the Appellate Division. *See, e.g., State v. Lodzinski*, 246 N.J. 331 (2021); *State ex rel. A.A.*, 240 N.J. 341 (2020); *State v. L.H.*, 239 N.J. 22 (2019); *State v. Cassidy*, 235 N.J. 482 (2018); *State v. Lunsford*, 226 N.J. 129 (2016); *In re State Grand Jury Investigation*, 200 N.J. 481 (2009);

State v. Osorio, 199 N.J. 486 (2009); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019); *State v. Jackson*, 460 N.J. Super. 258 (App. Div. 2019), *aff'd o.b.*, 241 N.J. 547 (2020); *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). Indeed, on various occasions, the ACDL-NJ affirmatively has been requested to file *amicus* briefs on matters of importance to the courts. *See, e.g.*, *State v. Bishop*, 429 N.J. Super. 533 (App. Div. 2013). These cases include ones specifically involving questions that bear upon a criminal defendant's right to discovery of potentially exculpatory evidence. *See, e.g., State v. Scoles*, 214 N.J. 236 (2013) (holding that defense must have access to images in child pornography prosecution, subject to appropriate protective order); *State v. Cohen*, 431 N.J. Super. 256 (App. Div. 2009) (same); *see also State v. Hernandez*, 225 N.J. 451 (2016) (considering defense's right to discovery of evidence regarding cooperating witness). In particular, the ACDL-NJ has participated as *amicus curiae* in support of the disclosure of internal affairs files in response to a public records request. *See Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, --- N.J. Super. ---, 2021 WL 1305863 (App. Div. Apr. 8, 2021).

Amicus curiae OPD represents the overwhelming majority of people facing criminal prosecution by the State. The first centralized public defense system of its kind in the United States, OPD was founded on July 1, 1967, to create an established system to assure that no criminal defendant will be without counsel simply because of an inability to afford an attorney. In its criminal-

defense function, the OPD not only provides legal counsel at the Superior Court trial level in each of the state's twenty-one counties, but also handles appeals and other ancillary legal proceedings. Given the OPD's commitment to ensuring that all defendants receive a fair trial, public defenders do and will represent many, and probably the vast majority, of criminal defendants who seek to challenge the credibility of police officer witnesses who have engaged in previous acts of misconduct.

OPD has appeared as *amicus curiae* in numerous other cases in this Court and in the Appellate Division. *See, e.g.*, *State v. Medina*, 242 N.J. 397 (2020) (confrontation clause); *State v. A.M.*, 237 N.J. 384 (2019) (waiver of *Miranda*); *State v. Pinkston*, 233 N.J. 495 (2018) (whether defendant may call adverse witnesses at detention hearing); *State v. Alexander*, 233 N.J. 132 (2018) (lesser-included jury instructions); *State v. S.N.*, 231 N.J. 497 (2018) (pretrial detention); *State v. J.R.*, 227 N.J. 393 (2017) (scope of CSAAS testimony); *State v. J.M.*, 225 N.J. 146 (2016) (404(b) evidence); *State v. Pena-Flores*, 198 N.J. 6 (2009) (motor-vehicle searches); *State v. Romero*, 191 N.J. 59 (2007) (cross-racial IDs); *State v. Moore*, 188 N.J. 182 (2006) (hypnotically refreshed testimony); *State v. Natale*, 184 N.J. 458 (2005) (sentencing); *State v. J.M.*, 182 N.J. 402 (2005) (whether juvenile can present evidence at waiver hearing); *State v. P.H.*, 178 N.J. 378 (2004) (CSAAS and fresh complaint); *State v. Garron*, 177 N.J. 147 (2003) (Rape Shield Law); *State v. Carty*, 170 N.J. 632 (2002) (consent car searches); *State v. Stovall*, 170 N.J. 346 (2002)

(investigative stop at airport); *State v. Stott*, 171 N.J. 343 (2002) (search in hospitals); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019) (use of body-wires to record defense counsel); *State v. Brown*, 456 N.J. Super. 352 (App. Div. 2018) (strip searches); *State v. Stewart*, 453 N.J. Super. 55 (App. Div. 2018) (whether defendant may call adverse witnesses at detention hearing).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Briefly stated, this case involves a request for public disclosure of records related to an internal affairs investigation, conducted by the Union County Prosecutor's Office (UCPO), of James Cosgrove, the former police director of the City of Elizabeth. The UCPO concluded, in a letter delivered to the complainants' attorneys and thereafter disclosed to the media, that "Cosgrove used derogatory terms in the workplace when speaking about city employees."[1] Upon public disclosure of the letter, numerous news stories reported on additional details regarding Cosgrove's racist and sexist commentary. Attorney General Gurbir Grewal publicly referenced the results of the IA investigation, stating that it "concluded that, over the course of many years, Director Cosgrove described his staff using derogatory terms,

[1] Rebecca Everett, *N.J. city's police director used n-word and sexist language toward staff, prosecutor's office finds*, NJ.com, Apr. 23, 2019, https://www.nj.com/union/2019/04/nj-citys-police-director-used-n-word-sexist-language-toward-staff-prosecutors-office-finds.html.

including racist and misogynistic slurs."[2] After days of public pressure, including from the Attorney General and numerous community groups, Cosgrove resigned.

Though the IA report regarding Cosgrove was publicly described, the underlying documents were not released. Plaintiff thus wrote to the UPCO on July 1, 2019, requesting disclosure of the records as required under the Open Public Records Act (OPRA) and/or the common law right of access. The UCPO denied the request in full on July 10, 2019 and Plaintiff accordingly filed a Verified Complaint and Order to Show Cause in the Law Division, seeking court-ordered disclosure of the records. The UCPO opposed this request, as did the City of Elizabeth, which was permitted to intervene. After oral argument, the court concluded that the records were subject to disclosure under OPRA, although it noted that redactions might be necessary to protect the identities of complainants and witnesses. Pca18. The court accordingly ordered the records to be produced under OPRA for *in camera* review. Pca20. The court did not reach Plaintiff's claim under the common law right of access.

The UCPO and Elizabeth moved for a stay in the trial court, which was denied, and for leave to appeal and a stay in the Appellate Division, both of which were granted. *Rivera v. Union Cnty. Prosecutor's Office*, No. A-2573-19T3 (App. Div. June 19, 2020) (slip op. at 8) (Pca29). In an unpublished opinion, the

[2] Statement of Attorney General Gurbir S. Grewal (Apr. 26, 2019), https://www.nj.gov/oag/newsreleases19/pr20190426c.html.

Appellate Division reversed the order requiring disclosure of the records for *in camera* review. First, although it rejected Defendants' claim that IA files are "personnel records" that are exempt from disclosure under N.J.S.A. 47:1A-10, the court accepted Defendants' argument that the records could not be disclosed because the Attorney General's Internal Affairs Policy and Procedures (IAPP), which limits disclosure of IA files, had the "force of law" and thus prohibited public access under N.J.S.A. 47:1A-9. *Id.* (slip op. at 13-20) (Pca34-41). The Appellate Division recognized that the trial judge intended to review the IA file for redactions, but it prohibited even this initial step because it concluded -- without the judges on the panel ever having reviewed the documents themselves[3] -- that it "would likely prove very difficult, if not impossible," to "prevent identification of the complainants and witnesses from the redacted document." *Id.* (slip op. at 22-23) (Pca43-44).

Next, though the trial court did not reach the issue and the parties had not briefed it, the Appellate Division nonetheless rejected Plaintiffs' claim to release of the IA report under the common law right of access. The court agreed that Plaintiff had met the first two requirements for disclosure: that the documents were "common law public records" and that Plaintiff had the

[3] Indeed, the appellate court relied on its inability to review the documents in rejecting Defendants' argument that the records were not subject to disclosure under the "grievance" exception to OPRA, N.J.S.A. 47:1A-1.1. *Rivera*, No. A-2573-19T3 (slip op. at 25-27) (Pca46-48).

required interest for disclosure "to further a public good." *Id.* (slip op. at 29) (Pca50). But the Appellate Division held that "the need for nondisclosure substantially outweighs [P]laintiff's need for disclosure of the IA records," because (1) "the questionable adequacy of protecting anonymity through simple redaction apply equally to the common law right of access"; and (2) the IAPP's confidentiality requirements, which made the records non-disclosable under OPRA, also applied to the common law right of access claim. *Id.* (slip op. at 32) (Pca53).

Plaintiff moved for reconsideration with regard to the common law right of access claim, requesting a remand to the trial court to conduct, in the first instance, the balancing required regarding that claim. The Appellate Division denied the motion by order dated July 29, 2020. Pca54-56. Plaintiff then petitioned this Court for certification, which was granted on May 14, 2021. 246 N.J. 236 (2021).

ARGUMENT

Amici's position in this case derives from two separate areas of law, though both implicate the values of transparency in government records. First, OPRA and the common law right of access promote public access to governmental records, and thus uncover the truth and thereby expose corruption or other public malfeasance. Second, this State's broad, "open-file" criminal discovery rules enhance truth-seeking and fairness in the criminal justice process, based upon the fundamental truth that the adversarial testing of claims after full disclosure to the parties

will allow a trial to reveal the true facts for the factfinder, whether judge or jury. These two strands of the law, which find common ground in their expressions of the value of transparency, converge in claims over the disclosure of internal affairs files, which, although containing the factual information necessary to test the credibility of police witnesses, are both shrouded from public view and inaccessible to criminal defendants and their attorneys. The Appellate Division's decision in this case, which creates a *per se* rule whereby any claim for disclosure of internal affairs records in response to a public records request must be rejected, runs contrary to the law's favoring of transparency, and should be rejected by this Court.

I. NEW JERSEY LAW FAVORS TRANSPARENCY, BOTH IN PUBLIC RECORDS REQUESTS AND CRIMINAL DISCOVERY.

It has long been the case that "New Jersey has a strong, expressed public policy in favor of open government." *McClain v. College Hosp.*, 99 N.J. 346, 355 (1985). In *McClain*, this Court recognized the historical origins of governmental transparency, explaining that modern public records laws have rejected "secrecy in government [as] one of the instruments of Old World tyranny" and instead express a "commit[ment] . . . to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Ibid.* (quoting *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)). The Court has further recognized that "governmental secrecy" itself "engenders public distrust in government and its

officials," and "[t]he sole method of combating these notions is to demonstrate their falsity by opening the doors of government so that the truth may be viewed by all." *S. Jersey Pub. Co., Inc. v. N.J. Expressway Auth.*, 124 N.J. 478, 492 (1991) (quoting Kugler, *New Jersey's Right to Know: A Report on Open Government* 175 (1974)). For these good reasons, our state's "decisional law has reflected this tradition towards openness." *McClain*, 99 N.J. at 355.

This tradition has been reflected in the Court's treatment of OPRA and the common law right of access. Thus, the Court has recognized that "OPRA succinctly sets forth the State's policy in favor of broad access to public records." *N. Jersey Media Grp. v. Twp. of Lyndhurst*, 229 N.J. 541, 556 (2017). It does so in order "to promote transparency in government and avoid 'the evils inherent in a secluded process.'" *In re Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6*, --- N.J. ---, 2021 WL 2303462, at *13 (June 7, 2021) (quoting *Brennan v. Bergen Cnty. Prosecutor's Off.*, 233 N.J. 330, 343 (2018)); *accord Mason v. City of Hoboken*, 196 N.J. 51, 64 (2008). As this Court has held, it is only through "access to information contained in records maintained by public agencies" that the citizenry can "monitor the operation of our government [and] hold public officials accountable for their actions." *Fair Share Hous. Ctr., Inc. v. State League of Municipalities*, 207 N.J. 489, 502 (2011).

OPRA itself thus declares that "any limitations on the right of access accorded by" the statute "shall be construed in favor of

the public's right of access." N.J.S.A. 47:1A-1. Accordingly, while it is true that OPRA is subject to exceptions, "the agency must make a 'clear showing' that one of the law's listed exemptions is applicable." *Lyndhurst*, 229 N.J. at 555 (quoting *Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004)). As just one example, in *Lyndhurst*, this Court rejected application of OPRA's exemption for release of information that would jeopardize a police officer's safety based on "generic reasons alone," instead requiring "[a] more particularized showing" to justify non-disclosure. *Id.* at 572.

Similar principles apply to claims made under the common law right of access, which provides an avenue beyond OPRA for obtaining government records. *See* N.J.S.A. 47:1A-8 ("Nothing in" OPRA "shall be construed as limiting the common law right of access to a government record."); *Mason*, 196 N.J. at 67 ("OPRA does not limit the common law right of access to government records."). In fact, far from being "mutually exclusive," rights under OPRA and the common law "complement each other, together embodying the State's strong commitment to access to public records." *S. Jersey Pub. Co.*, 124 N.J. at 489. Indeed, the common law covers a "broader class of materials," *Lyndhurst*, 229 N.J. at 578, including any "written memorial" that is "made by a public officer" who is "authorized by law to make it." *Nero v. Hyland*, 76 N.J. 213, 222 (1978) (quoting *Josefowicz v. Porter*, 32 N.J. Super. 585, 591 (App. Div. 1954)). However, unlike OPRA, access to records under the common law requires "a greater showing" of "an interest in the

subject matter of the material," which must be "balanced against the State's interest in preventing disclosure." *Lyndhurst*, 229 N.J. at 578 (quoting *Mason*, 196 N.J. at 67-68); *see also Loigman v. Kimmelman*, 102 N.J. 98, 113 (1986) (listing factors to be considered).

That said, this Court has recognized "the public's powerful interest in disclosure of" certain documents and information under the common law, *Lyndhurst*, 229 N.J. at 551, and accordingly has rejected claims of confidentiality that rested on "only generic safety concerns," *id.* at 580. Specifically in the context of IA files, the Appellate Division has explained that although "there are important public policies that are served in maintaining the confidentiality of IA files," these "general" concerns must be balanced against "the unique circumstances of" each individual case. *Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, --- N.J. Super. ---, 2021 WL 1305863, at *11 (App. Div. Apr. 8, 2021). Indeed, in *Gannett Satellite*, the court affirmed the trial judge's ruling that "based on the specific facts and circumstances of th[e] matter . . . disclosure was required under the common law." *Id.* at *12.

Of course, even more robust disclosure requirements apply in the context of criminal litigation, where *amici*'s interests lie. Just like in the public records context, "pretrial discovery in criminal trials has long received favorable treatment in this state" because it serves a "meaningful role . . . in promoting the search for truth" and "in promoting a just and fair trial." *State*

v. Scoles, 214 N.J. 236, 251 (2013). Thus, this Court has confirmed that "[t]he accused in a criminal case is generally 'entitled to broad discovery.'" *State ex rel. A.B.*, 219 N.J. 542, 555 (2014) (quoting *State v. D.R.H.*, 127 N.J. 249, 256 (1992)). New Jersey accordingly has adopted the "open-file approach to discovery in criminal matters." *Id.* at 252; *see also State v. Hernandez*, 225 N.J. 451, 453 (2016) ("This open-file approach is intended to ensure fair and just trials."). The Court Rules thus "grant[] a defendant automatic access to a wide range of relevant evidence." *A.B.*, 219 N.J. at 555; *see also R.* 3:13-3.

These broad criminal discovery rules apply to exculpatory evidence, not only as a matter of the Court Rules, *see R.* 3:13-3(b)(1) ("Discovery shall include exculpatory information or material."), but also under the State and federal Constitutions. Thus, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, establish the State's constitutionally-based "affirmative obligation to disclose evidence favorable to a defendant." *State v. Hyppolite*, 236 N.J. 154, 165 (2018). That rule "encompasses evidence that the defendant might have used to impeach government witnesses." *State v. Knight*, 145 N.J. 233, 245 (1996); *see also Hyppolite*, 236 N.J. at 165 ("Impeachment evidence, as well as exculpatory evidence, is governed by the *Brady* rule." (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985))). As the United States Supreme Court has recognized, impeachment evidence that is "disclosed and used effectively" can "make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676; *see also*

Giglio v. United States, 405 U.S. 150, 153 (1972) (holding that "nondisclosure of evidence affecting credibility falls within" *Brady* rule because "the 'reliability of a given witness may well be determinative of guilt or innocence'" (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959))).

Criminal trials, then, are robbed of the ability to reveal the true facts of a case in the absence of broad discovery. This is particularly so with regard to impeachment evidence, which is critical to conducting an effective cross-examination, and thus "serves one of the core principles of the justice system: to seek the truth by confronting and possibly exposing a witness who may lack credibility." *State v. Scott*, 229 N.J. 469, 492-93 (2017) (Rabner, C.J., concurring); *see also Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (holding that the Sixth and Fourteenth Amendments to the United States Constitution guarantee to a criminal defendant the right to cross-examine witnesses against him). In our adversarial legal system, "cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate." *United States v. Salerno*, 505 U.S. 317, 328 (1992) (Stevens, J., dissenting); *see also State ex rel. J.A.*, 195 N.J. 324, 342 (2008) ("It has long been held that cross-examination is the greatest legal engine ever invented for the discovery of truth." (quoting *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted)); *United States v. Riggi*, 951 F.2d 1368, 1376 (3d Cir. 1991) ("Cross-examination

is the principal means by which the trustworthiness of a witness is tested.").

In sum, New Jersey law consistently recognizes the benefits of transparency and disclosure of government records and information, not only generally, as embodied in OPRA and the common law right of access, but also specifically in the criminal justice context, with New Jersey's uniquely broad discovery rules. As described below, these principles should inform the Court's decision here, which should reverse that of the Appellate Division because it is inconsistent with these principles, elevating as it does the secrecy and confidentiality of IA records by broadly prohibiting their public disclosure, even with redactions.

II. INTERNAL AFFAIRS FILES REGULARLY CONTAIN EVIDENCE RELEVANT TO A CRIMINAL CASE THAT MAY BE UNCOVERED BY A PUBLIC RECORDS REQUEST.

Criminal cases often turn largely, if not entirely, on the credibility of police officer witnesses. Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 Pepp. L. Rev. 245, 296 (2017) ("Despite the thousands of instances of police corruption, the criminal justice system churns on, and in many instances, convicts people based on police testimony alone."). That credibility must, accordingly, be subject to attack through appropriate cross-examination, and that cross-examination should encompass evidence of police misconduct that may be available in internal affairs records. *See, e.g.*, *United States v. Davis*, 183 F.3d 231, 256-57 (3d Cir. 1999) (approving cross-examination of defendant police

officer's prior acts of police misconduct, including false entries in police logs and lying to internal affairs, because those instances "went to [the officer's] untruthfulness"); *Dorsey v. State*, 582 S.E.2d 158 (Ga. App. 2003) (explaining that defense counsel used an internal affairs report "to conduct an extensive and effective cross-examination of" the police officer witness, and obtained an acquittal on the most serious charge against the defendant); *In re Shamik M.*, 986 N.Y.S.2d 566, 1057 (N.Y. App. Div. 2014) (reversing juvenile delinquency adjudication where police officer testimony was impeached by prior findings of misconduct and internal affairs complaint history). Moreover, impeachment of an officer's credibility is relevant not only at trial, but also in decisions regarding pre-trial detention, *see Hyppolite*, 236 N.J. at 173-74 (where impeachment evidence was not disclosed prior to a detention hearing, remanding for a new detention hearing due to the "reasonable *possibility* that the result would have been different" (emphasis in original)), and on motions to suppress, *see Forrest v. Parry*, 930 F.3d 93, 100 (3d Cir. 2019) (describing how Camden police officers "admitted to . . . lying under oath . . . at suppression hearings"); *cf. State v. Davila*, 203 N.J. 97, 110 (2010) (affirming lawfulness of police entry into defendant's home because "there was adequate, substantial and credible support in the record for the court's determination to credit the testifying officer's evidence").[4]

[4] The New Jersey Rules of Evidence have also been liberalized to allow the introduction of just this type of evidence. Thus, New Jersey Rule of Evidence 608 previously prohibited "the use of

Indeed, courts have reversed convictions based on the unavailability of internal affairs records, or limitations on their use in cross-examination. *See State v. El-Laisy*, Docket No. A-1513-17T1, 2019 WL 3183647, at *2-5 (App. Div. July 16, 2019) (reversing conviction where prosecution did not disclose existence of open internal affairs investigations, where officer testified at trial that he had been "cleared" on all such investigations).[5] Some of those cases result from direct appeals. *See, e.g.*, *ibid.*; *Robinson v. State*, 730 A.2d 181, 196 (Md. 1999) (reversing conviction because of failure to provide defense with internal

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specific conduct evidence to challenge a witness's credibility for truthfulness." *State v. Guenther*, 181 N.J. 129, 141 (2004) (citing *N.J.R.E.* 608). This Court recently changed that Rule, broadening the circumstances under which witnesses can be cross-examined based on their character for untruthfulness through specific prior instances of misconduct. *See N.J.R.E.* 608(b), (c) (providing for use of specific prior instances of misconduct to impeach witness's credibility) (effective July 1, 2020). Thus, cross-examining a police witness regarding prior false statements -- which could very well be found in internal affairs records -- would now be relevant evidence for a jury to consider in evaluating the witness's credibility. *See Scott*, 229 N.J. at 492 (Rabner, C.J., concurring) (advocating for these revisions to *N.J.R.E.* 608 because "question[s] about specific conduct that generally involves dishonesty or false statements . . . relate[] to the witness's veracity and credibility" and are "plainly pertinent to the jury's ability to evaluate the witness's credibility"). Hence, there is now little question as to the admissibility of the information here sought, once it is made available.

[5] In accordance with *Rule* 1:36-3, all of the unpublished opinions cited in this brief are reproduced in *Amici*'s appendix. No contrary unpublished decisions are known to counsel. These opinions are not relied upon as legal precedent, but instead are used to provide "factual evidence" and background on how the prevailing legal standards are applied. *See In re D.L.B.*, --- N.J. Super. ---, No. A-1035-20 (App. Div. July 14, 2021) (slip op. at 3 n.2).

affairs for cross-examination, where defendant's "credibility, as contrasted with that of the officers, was extremely important"); *B.M. v. State*, 66 So.3d 1013, 1015 (Fla. Dist. Ct. App. 2011) (reversing conviction because of failure to permit cross-examination of police witness based on internal affairs complaint, where the "case involved a 'classic swearing match' between the police and [defendant]"); *cf. United States v. Whitmore*, 359 F.3d 609, 619-20 (D.C. Cir. 2004) (holding that district court improperly denied cross-examination based on judicial finding that officer had previously testified falsely under oath and other misconduct because such evidence "was strongly probative of [the officer's] character for untruthfulness"). Others lead to convictions being vacated as part of an application for post-conviction relief. *See, e.g.*, *Milke v. Ryan*, 711 F.3d 998, 1012-13 (9th Cir. 2013) (identifying, among other undisclosed impeachment evidence, an internal affairs report stating, of police officer witness, that "[y]our image of honesty, competency, and overall reliability must be questioned"); *State v. Laurie*, 653 A.2d 549, 552 (N.H. 1995) (reversing conviction based on undisclosed impeachment evidence in police officer witness's personnel file, which revealed "numerous instances of conduct that reflect negatively on [the officer's] character and credibility").

There are, in fact, numerous examples both in New Jersey and elsewhere of how IA investigations into police misconduct have led to the exoneration of defendants, either by providing evidence that directly undermined the defendant's guilt, or by otherwise

impugning the credibility of police witnesses such that the criminal charges cannot stand. For example, Camden's infamous "fourth platoon" engaged in a course of conduct in the late 2000s that resulted in federal prosecutions of a number of officers for violating citizens' civil rights. *United States v. Figueroa*, 729 F.3d 267, 270-71 (3d Cir. 2013) (describing instances of misconduct that resulted in three police officers pleading guilty and a fourth officer being convicted at trial). Several police officers "admitted to filing false reports, planting drugs, and lying under oath in front of grand juries, at suppression hearings, and at trials," including, for example, an officer who "admitted that he did not observe a hand-to-hand drug transaction, but falsely included that in the report he had prepared." *Forrest*, 930 F.3d at 100; *see also Figueroa*, 729 F.3d at 271 (describing specific allegations of misconduct, including illegal searches, lying about finding contraband in plain view, and planting drugs on arrestees). These charges were closely linked to numerous internal affairs complaints alleging the same type of misconduct, which had for many years been withheld from public view. *See Forrest*, 930 F.3d at 102 (describing multiple internal affairs complaints alleging that officers planted drugs on arrestees). It was only when the misconduct finally became public that the Camden County Prosecutor dismissed charges, including pending indictments. *Id.* at 100.

As another example, Sergeant Ronald Watts in Chicago spearheaded a decades-long effort to extort and frame innocent people at a public housing complex, which has resulted in the

reversal of almost 100 criminal convictions. Grace Hauck, *Prosecutors have thrown out nearly 100 convictions tied to 'rogue' Chicago cop*, USA Today, Feb. 11, 2020, https://bit.ly/3eUI2Kp. Watts and others who worked with him planted drugs and otherwise made false allegations against those who would not participate in the extortion scheme. *See, e.g.*, *People v. Glenn*, 106 N.E.3d 462, 463-64 (Ill. App. 2018) (describing exoneration of falsely convicted defendants). An internal affairs investigation of Watts began as early as 2009, yet his conduct continued for years, hidden from public view, before he was arrested in 2012. *See* Phil Rogers, *CPD Had Ample Warning of Allegations Against Officers*, NBC5 Chicago, Nov. 17, 2017, https://www.nbcchicago.com/news/local/cpd-had-ample-warning-of-allegations-against-officers/28416/.

As these cases show, internal affairs records can have a profound effect on criminal proceeding. Certainly, the exculpatory evidence they yield must be turned over to the defense under the criminal discovery rules and as part of the prosecution's *Brady* obligations in any event. *See State v. Nelson*, 155 N.J. 487, 498 (1998) (explaining that *Brady* obligation extends to "any favorable evidence known to others acting on the government's behalf, including the police" (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995))). Yet it is apparent that this ideal is often not met. *See, e.g.*, *El-Laisy*, 2019 WL 3183647, at *2-5 ("The State presented false testimony and failed to disclose pertinent impeachment evidence" regarding police witness's open IA

investigation).[6] This is in part because under current practice, internal affairs files are kept strictly confidential, even within police departments, where only certain officers can access the records. *See Internal Affairs Policy & Procedures* § 9.5 (N.J. Att'y Gen. Aug. 2020), https://www.nj.gov/oag/dcj/agguide/directives/IAPP-August-2020-Version.pdf. Thus, despite the obligation to disclose this information, as a practical matter, even prosecutors may not have access to this essential information. *See* Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743, 747 (2015) (arguing that "critical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access to [police] personnel files").[7]

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[6] The officer at issue in the *El-Laisy* case, Sterling Wheaten, faces federal charges based on a separate incident for civil rights violations and falsifying records. *See* Kala Kachmar, *Atlantic City K9 cop linked to $4.5M in settlements indicted by feds*, Asbury Park Press, Oct. 11, 2018, https://www.app.com/story/news/investigations/watchdog/shield/2018/10/11/atlantic-city-k-9-cop-indicted-sterling-wheaten/1607074002/.

[7] Other states have similarly encountered situations in which prosecutor's offices have been denied access to exculpatory and impeachment material in IA files, inhibiting adequate disclosure of *Brady* evidence. In New York City, after a news organization published previously undisclosed records of police misconduct, the Manhattan District Attorney's office wrote to the New York Police Department to demand access to police disciplinary records, which, it noted, "is often denied to our office by the NYPD itself." Mike Hayes & Kendall Taggart, *The District Attorney Says The NYPD Isn't Telling Prosecutors Which Cops Have A History Of Lying*, BuzzFeed News, June 2, 2018, https://www.buzzfeednews.com/article/mikehayes/nypd-cops-lying-discipline-disrict-attorneys-prosecutors. In Little Rock, Arkansas, the former police chief

Furthermore, the Appellate Division has adopted a particularly restrictive rule regarding disclosure of IA files in response to a criminal discovery request, requiring that "the party seeking an *in camera* inspection [of police personnel records] must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.'" *State v. Harris*, 316 N.J. Super. 384, 398 (App. Div. 1998) (quoting *State v. Kaszubinski*, 177 N.J. Super. 136, 141 (Law Div. 1980)). Under this authority, a defendant thus "shoulder[s the] burden of advancing some factual predicate that would make it reasonably likely that the information in the file could affect the [officer's] credibility." *Id.* at 399. And even then, a defendant who presents *some* factual basis to connect the officer to misconduct may still not obtain discovery if the factual basis is too "minimal." *See State v. Goldsmith*, Docket No. A-2496-11T1, 2013 WL 5507742, at *7 (App. Div. Oct. 7, 2013). This and other

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testified at a deposition that the department does not disclose internal disciplinary findings to prosecutor's offices; a newspaper analysis concluded that over the course of fifteen years, "officers who the department determined lied or committed crimes were witnesses in at least 4,000 cases." Steve Reilly & Mark Nichols, *Hundreds of police officers have been labeled liars. Some still help send people to prison.*, USA Today, Oct. 14, 2019, https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/.

case law has consistently rejected a criminal defendant's request for disclosure of IA records.[8]

Those rules should be revisited but, in any event, OPRA access to IA files can fill the gap left by these restrictions. Indeed, the experience of other states, where IA records are made publicly available, demonstrates how such access can enhance fairness and factfinding in criminal matters, and prevent the wrongful conviction of criminal defendants. For example, *Dorsey v. State*, *supra*, in which a defense attorney effectively utilized an IA report to cross-examine a police witness and obtain an acquittal on the most serious charges, *see* 582 S.E.2d at 183, took place in Georgia, where internal affairs records are publicly available following the disposition of the complaint. *See* Ga. Code § 50-18-72(a)(8). And *B.M. v. State*, *supra*, where defense counsel had access to the IA records (though the defense was unlawfully prohibited from using them in cross-examination, *see* 66 So.3d at 1014-15), is a case from Florida, where internal affairs records

[8] *See, e.g.*, *State v. Cerrone*, Docket No. A-0031-08T4, 2010 WL 3075470, at *6 (App. Div. Aug. 4, 2010) (affirming denial of discovery of internal affairs records because "[t]he record is devoid of any evidence that [officer] acted in an unlawful or in an inappropriate manner toward defendant or toward any other third parties"); *State v. Felton*, Docket No. A-0062-14T3, 2017 WL 1737906, at *8 (App. Div. May 4, 2017) (affirming denial of discovery of internal affairs records because defendant "did not present a factual basis to support his request"); *State v. Potter*, Docket No. A-1175-12T3, 2015 WL 3843309, at *14 (App. Div. June 23, 2015) (affirming denial of discovery of internal affairs records because defendant "failed to meet his burden" regarding discovery).

are subject to public access once "the investigation ceases to be active." Fla. Stat. § 112.533(2)(a).

Likewise, the California experience also demonstrates the beneficial impact of public access to IA records. Specifically, California recently modified its law to explicitly provide for public disclosure of internal affairs records related to particularly serious matters, including those regarding discharges of firearms or the use of force resulting in great bodily injury or death; sustained allegations of sexual assault involving a member of the public; and sustained findings of dishonesty by a police officer. *See* S.B. 1421 (Cal. 2018) (codified at Cal. Penal Code § 832.7(b)). After the law went into effect on January 1, 2019, news reporting swiftly resulted in dismissal of criminal cases that resulted from revelations uncovered from internal affairs records. In one case, a woman had been charged with resisting arrest and battery against two police officers who responded to her 911 call. Sukey Lewis & Thomas Peele, *DA Dismisses Charges Against Woman Mauled by Rio Vista Police Dog*, KQED, Mar. 4, 2019, https://www.kqed.org/news/11730477/impact-da-dismisses-charges-against-woman-mauled-by-rio-vista-police-dog. However, an internal affairs report concluded that the arresting officer had "put distorted information into police reports to trump up the charges against" the defendant, including a "patently false" claim that "she had injured the officers by biting them." *Ibid.* Critically, prior to the news reporting regarding the internal affairs investigation, the prosecutor's office was unaware of the

investigation and its findings. *Ibid.* ("Chief Deputy District Attorney Sharon Henry said prosecutors, too, learned about the internal affairs case only by reading the reporting."). Once the matter came to light, the prosecutor's office dismissed all charges. *Ibid.*

In another instance, public news reporting revealed that a police officer in Antioch, California had been fired for "leaking information to known criminals" and "mishandl[ing] evidence." Alex Emslie & Sukey Lewis, *Contra Costa County DA to Dismiss Three Cases Involving Fired Antioch Detective*, KQED, Dec. 19, 2019, https://www.kqed.org/news/11792317/contra-costa-county-da-to-dismiss-three-cases-involving-fired-antioch-detective. Again, only after this news reporting did the prosecutor's office become aware of the information, leading to a review that resulted in the dismissal of three criminal convictions because the officer's "now-questionable credibility [had] undermined those prosecutions." *Ibid.*

As these examples show, public access to internal affairs records can and does shed light on facts and issues significant to criminal matters, which would not otherwise become known, but which have a direct impact upon the prosecution of criminal matters and the vindication of the constitutional rights of criminal defendants to obtain exculpatory (and especially impeachment) evidence in their defense. Such transparency is thus in furtherance of the goals of the public records laws, which include "avoid[ing] 'the evils inherent in a secluded process,'" *In re*

Att'y Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 2021 WL 2303462, at *13 (quoting *Brennan*, 233 N.J. at 343), and those of open criminal discovery, such as "promoting the search for truth" and "a just and fair trial." *Scoles*, 214 N.J. at 251.

III. THE APPELLATE DIVISION'S DECISION ERRS IN ITS SWEEPING RULING REJECTING ALL PUBLIC ACCESS TO INTERNAL AFFAIRS RECORDS.

As described above, internal affairs records can contain information that is critical to seeking truth and assuring fairness in criminal matters. Yet the Appellate Division's decision in this case denied access to internal affairs files, both under OPRA and the common law. Of particular concern to *amici* is the overbreadth of the Appellate Division's opinion, which, as further discussed below, appears to bar all access to IA records, in any circumstance and for any reason, despite the well-recognized salutary effects of public access described in this brief. Indeed, in a subsequent published opinion, the Appellate Division in *Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, *supra*, --- N.J. Super. ---, 2021 WL 1305863, applied the correct analysis, balancing the critical need for disclosure of IA materials against the interests in their confidentiality and, in that case, ordered disclosure of the records. But that was not the analysis performed by the Appellate Division here.

Instead, the Appellate Division here described several benefits to "maintaining the confidentiality of the complainants, witnesses, and officers involved in an IA investigation." *Rivera*, No. A-2573-19 (slip op. at 21) (Pca42). But then, despite

acknowledging that "the trial court intended to redact the names and identifying circumstances to protect the complainants and witnesses from retribution and intimidation," the court simply gave up, concluding (without reviewing the documents, or remanding to the trial court for such a review to take place) that the "task would likely prove difficult, if not impossible." *Id.* (slip op. at 22) (Pca43). This is contrary to the prescribed analysis under OPRA, which certainly protects against the release of information that "would violate [a] citizen's reasonable expectation of privacy," N.J.S.A. 47:1A-1, but as this Court has explained, requires application of a "balancing test that weighs *both* the public's strong interest in disclosure with the need to safeguard from public access personal information that would violate a reasonable expectation of privacy." *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 427 (2009) (emphasis added). In *Burnett*, the Court made clear that the factors weigh in the balancing include not only factors that could weigh in favor of privacy, but also those that support public access, such as "the degree of need for access" and the existence of any "recognized public interest militating towards access." *Ibid.* (quoting *Doe v. Portiz*, 142 N.J. 1, 88 (1995)). And although such balancing "must be applied case by case," *id.* at 437, including whether any privacy interests may be protected through redaction, *see Keddie v. Rutgers, State Univ.*, 148 N.J. 36, 54 (1997), here the Appellate Division looked only at generalized factors that, in its view, weighed against disclosure, and applied them without considering such alternatives, or the

interest in disclosure of the records. *Rivera*, No. A-2573-19 (slip op. at 21-23) (Pca42-44). But as this Court has recognized before, such "generic" concerns are an insufficient basis to deny disclosure. *Lyndhurst*, 229 N.J. at 572, 580; *cf.* Cal Penal Code § 832.7(b)(5)(D) (permitting redaction of records "[w]here there is a specific, articulable, and particularized reason to believe that disclosure of the record would pose a significant danger to the physical safety of the peace officer, custodial officer, or another person").

Here, as noted above, other states, such as California, Florida, and Georgia, permit public access to IA records, undermining the Appellate Division's conclusion that disclosure should be absolutely barred. Indeed, some statutes specifically provide for appropriate redaction, demonstrating that, it is simply not true, as the court below concluded, that such measures are impossible. *See, e.g.*, Cal. Penal Code § 832.7(b)(5)(B) ("An agency shall redact a record disclosed pursuant to this section . . . [t]o preserve the anonymity of complainants and witnesses."). Moreover, as this Court has recognized, redaction and other controls over disclosure have been successfully utilized in the OPRA context to permit disclosure of public records while also protecting against the improper disclosure of protected information. *See Burnett*, 198 N.J. at 437 (authorizing release of records with social security numbers redacted); *Paff v. Ocean Cnty. Prosecutor's Office*, 235 N.J. 1, 238 (2018) ("In other circumstances, the blurring of a victim's face or other methods of

redaction prior to disclosure of an MVR recording may resolve a privacy concern."); *see also Neptune*, --- N.J. Super. at ---, 2021 WL 1305863, at *11 (affirming trial court decision releasing IA files where "[t]he judge stated that any harm resulting from disclosure could be addressed by redactions of the names of witnesses, or officers who investigated the complaints"). Thus, while the Appellate Division "question[ed] the adequacy of" redaction, because identities of complainants and witnesses "can often be readily determined from context or information that a judge conducting an in camera review may deem innocuous," *Rivera*, No. A-2573-19 (slip op. at 23) (Pca44), this analysis, presuming that redaction is not feasible, turns the OPRA standard on its head: judicial review under OPRA presumes that public records *should be* disclosed, absent "a clear showing that one of the law's listed exemptions is applicable." *Lyndhurst*, 229 N.J. at 555; *see also* N.J.S.A. 47:1A-1 (OPRA "shall be construed in favor of the public's right of access").[9]

Finally, with respect to the common law right of access, the Appellate Division did not follow this Court's precedents

[9] Indeed, the cases upon which the Appellate Division relied in concluding that redaction of the records might be "impossible," *Rivera*, No. A-2573-19 (slip op. at 22) (Pca43), required case-by-case adjudication of the issues, not a blanket rule disfavoring redaction, and ultimately, disclosure. *See L.R. v. Camden City Pub. Sch. Dist.*, 452 N.J. Super. 56, 91 (App. Div. 2017) (requiring review of redactions to "be conducted on a case-by-case basis"), *aff'd by an equally divided court*, 238 N.J. 547 (2019); *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 441 N.J. Super. 70, 108 (App. Div. 2015) ("A case-by-case analysis is appropriate."), *rev'd in part*, 229 N.J. 541 (2017).

requiring a "careful balancing" of the interests at stake. *Lyndhurst*, 229 N.J. at 580. Instead, after summarily concluding that "Plaintiff has the requisite interest in the subject matter of the documents 'to further a public good,'" *Rivera*, No. A-2573-19 (slip op. at 29) (Pca50) (quoting *Loigman*, 102 N.J. at 104), the court considered only factors that counseled against disclosure, without weighing them against the interests that supported disclosure. *Id.* (slip op. at 30-32) (Pca51-53). As part of that analysis, the court repeated the same error it had committed in the OPRA context: it applied "the same concerns" regarding the confidentiality of the materials, including "the questionable adequacy of protecting anonymity through simple redaction." *Id.* (slip op. at 32) (Pca53). Those conclusions were error not only because, as described above, they failed to adequately consider the possibility of redacting specific passages in order to address any privacy concerns, but more fundamentally, with respect to the common law right of access in particular, the lower court did not really consider the public's interest in disclosure of the records by way of counterbalance to the UCPO's interest in confidentiality. *See S. Jersey Pub. Co.*, 124 N.J. at 488 (explaining that "the court should balance" the factors supporting confidentiality "'[a]gainst . . . the importance of the information sought to the plaintiff's vindication of the public interest.'" (quoting *Loigman*, 102 N.J. at 113).

Of particular concern to *amici* is the *per se* nature of the rule yielded by the Appellate Division's opinion, which sweeps

beyond the facts of this case to the "need for disclosure of IA records" in general. *Rivera*, No. A-2573-19T3 (slip op. at 32) (Pca53); *see also* Pca55 (Order on motion for reconsideration stating that "[t]he right to access confidential IA records is a legal issue"). It is all the more alarming because of its inconsistency with other precedent: the decision here stands in stark contrast to the subsequent published decision in *Neptune*, *supra*, in which Judge Yannotti's thoughtful opinion made clear that "the unique circumstances of" a particular matter can "tip[] the balance in favor of disclosure." --- N.J. Super. at ---, 2021 WL 1305863, at *11. The *Neptune* opinion thus commended the trial court judge for "carefully consider[ing] the effect disclosure of an IA file could have upon the agency's functions and other IA investigations," and affirmed the trial judge's conclusion that "based on the specific facts and circumstances of this matter, that disclosure was required under the common law." *Id.* at *12. Thus, unlike the decision below in this case, the decision in *Neptune* reflects the "careful balancing that each case . . . requires," as compelled by this Court's precedents governing the common law right of access. *See Lyndhurst*, 229 N.J. at 580.

Thus, in reaching its decision in this case, *amici* respectfully submit that this Court should make clear that in assessing whether IA records should be disclosed under the common law, the interests in confidentiality must be meaningfully weighed against the interests in disclosure, including whether the former can be adequately protected through such devices as redaction.

And as argued above, the interests in disclosure of IA records should include the need to assure accurate factfinding and fundamental fairness in criminal matters by assuring that criminal defendants, and their counsel, can access impeachment and exculpatory evidence in order to effectively defend against prosecutorial efforts to deprive defendants of their blessed freedom.

CONCLUSION

For the reasons set forth above, *amici curiae* the ACDL-NJ and OPD respectfully urge the Court to reverse the decision of the Appellate Division and make clear that IA files are subject to public disclosure in appropriate cases. Such a ruling will help foster a criminal justice system that is fair, accurate, and consistent with the constitutional requirements that exculpatory, and especially impeachment, evidence should be made available to the defense.

Respectfully submitted,

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amici Curiae

BY: *s/ Lawrence S. Lustberg*
Lawrence S. Lustberg, Esq.

BY: *s/ Michael R. Noveck*
Michael R. Noveck, Esq.

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Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Mohamed B. EL-LAISY, Defendant-Appellant.

DOCKET NO. A-1513-17T1
|
Submitted June 5, 2019
|
Decided July 16, 2019

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 13-05-1502.

Attorneys and Law Firms

Robert Marc Gamburg (Gamburg and Benedetto), attorney for appellant.

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Dylan P. Thompson, Assistant Prosecutor, on the brief).

Before Judges Koblitz and Mayer.

Opinion

PER CURIAM

***1** Defendant appeals from his October 20, 2017 convictions of third-degree assault against a police officer, N.J.S.A. 2C:12-1(b)(5)(a); two counts of fourth-degree obstructing the administration of law, N.J.S.A. 2C:29-1(a) and(b); and two counts of third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3)(a). He received an aggregate sentence of probation for two years. The jury convicted defendant of assaulting an officer in a September 2011 casino night-club brawl, rejecting his claim that he acted in self-defense after that officer attacked him.

After the verdict, defense counsel learned the State had not disclosed that the officer remained the subject of two ongoing investigations by the police department's Internal Affairs Unit (IA) for excessive force, including the incident involving defendant. The State also did not reveal that the Federal Bureau of Investigation (FBI) had initiated an investigation into the officer, or that the officer had asserted his right to remain silent over 1400 times when questioned in a federal civil suit brought by another citizen, D.C. [1] Defendant argues that these non-disclosures, as well as the officer's false statement that IA had "cleared" him of all allegations, violated Brady v. Maryland, 373 U.S. 83 (1963). We agree that the failure to disclose the ongoing investigations into the officer's conduct and his testimony in the civil suit violated Brady and reverse. We reject defendant's further argument that he was denied a speedy trial.

After his December 2011 indictment, and a subsequent May 2013 superseding indictment, [2] which charged him with assaulting two officers, defendant moved for production of Atlantic City Police Department (ACPD) IA materials. After in camera review, the motion court [3] allowed defendant to cross-examine the officer about twenty-two IA investigations into the officer's conduct. The motion court found that eight of the complaints involved suspects charged with conduct similar to the charges against defendant. It also found that in the officer's report of those eight incidents he quoted the suspects as using near identical language to statements he claimed defendant made. The motion court also allowed defendant to cross-examine the officer regarding these eight incidents.

The court held, "as a matter of reciprocal fairness, the fact that [the officer] was effectively 'cleared' in all [twenty-two] excessive force complaints by the ACPD may be addressed by either (or both) parties in the course of cross or redirect examination (or both)."

At trial, both officers and casino security personnel testified, describing their initial encounter and subsequent struggle with defendant, and defendant hurling verbal abuse. Defendant also testified, asserting he acted in self-defense. Both sides played portions of surveillance footage from the casino club. Because the footage was grainy and not consistently clear, counsel asked the witnesses to explain the action and point out their presence at different times. While the video showed defendant resisting and struggling with the officers, it did not capture the first moments of the altercation; thus, it could not definitively show who instigated the fight. The jury convicted defendant of all charges relating to the officer who had received citizen complaints, but acquitted defendant of assaulting the other officer.

***2** Defendant raises the following issues on appeal:

POINT I: THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON VIOLATIONS OF BRADY, GIGLIO[4] AND AFTER DISCOVERED EVIDENCE.

POINT II: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S SPEEDY TRIAL MOTION AND ALLOWING OVER FIVE YEARS TO ELAPSE FORM THE DATE OF OFFENSE UNTIL TRIAL.

A. LENGTH OF DELAY.

B. REASON FOR DELAY.

C. ASSERTION OF RIGHT.

D. PREJUDICE TO DEFENDANT.

I. Brady Violation.

After the verdict but before sentencing, defense counsel received IA investigation documents from another attorney. The materials included an April 2016 affidavit by ACPD Chief Henry White, in connection with a federal civil suit against the officer and the ACPD by D.C. White certified that IA began an investigation into the officer relating to D.C.'s allegation of excessive force, but suspended the investigation:

> 3. After assigning the matter with an [IA] Case Number, the Atlantic County Prosecutor's Office [ACPO] was notified of the [IA] Complaint, and the [ACPO] took possession of the investigation prior to any substantive investigative work being performed, other than document review, by the Atlantic City [IA].
>
> 4. The [ACPO] has completed their investigation and the Atlantic City [IA] is currently in possession of the [IA] file; however, no investigation has commenced on the part of the [ACPD] or the Atlantic City [IA].
>
> 5. The Atlantic City [IA] has elected not to follow up with an internal affairs investigation into the matter based upon the fact the we have reason to believe that the matter is currently under investigation by the [FBI], and as such, we will not begin the internal affairs investigation unless and until we receive written confirmation from the [FBI] that their investigation has concluded; and, upon advice and the recommendation of the New Jersey State Association of Chiefs of Police, ... the Atlantic City [IA] has been hesitant to pursue an internal affairs investigation into any matters that are associated with pending civil litigation.

Because defendant, like D.C., sued the officer for excessive force, defendant reasoned the IA investigation relating to his complaint against the officer was also suspended pending the civil litigation

Defendant also received a copy of ACPD Captain Jerry Barnhart's certification, also for D.C.'s civil suit, stating that IA had not concluded its investigation into either D.C.'s or defendant's excessive-force complaint. Barnhart affirmed that defendant's complaint

> remains as an open IA case and Sgt. Johnson has indicated he will prioritize the matter along with two other internal affairs matters he has been required to prioritize and, as such, is working several cases including [El-Laisy's] simultaneously and moving them along as expeditiously as he is able.

Barnhart noted that defendant "remains pending criminal trial which has been postponed several times with trial presently scheduled, to my understanding, this month (September 2016)." He certified: "Police Chief Henry White suspended the [D.C.] investigation because of pending litigation. This decision was based on a recommendation from the State Chiefs' Association."

***3** Defendant also received the officer's December 2015 deposition for D.C.'s federal civil suit, in which the officer answered virtually every question by asserting his Fifth Amendment right to remain silent. According to defendant, during the 253-page deposition, the officer invoked the Fifth Amendment more than 1400 times.

Defendant moved for a new trial, claiming the State violated his right to exculpatory evidence by not disclosing these materials and that the documents constituted after-discovered evidence requiring a new trial.[5] The trial court denied defendant's post-trial motion. Mistakenly analyzing the situation under the Rule 3:20-1 test for vacating a verdict that is against the weight of the evidence, the court concluded that, after giving "due regard to the opportunity of the jury

to pass upon the credibility of the witnesses," defendant could not "clearly and convincingly" demonstrate "a manifest denial of justice."

On appeal, defendant renews his argument that the State violated Brady by not disclosing that the IA investigations relating to both defendant and D.C. remained ongoing; that the officer was the subject of an FBI investigation; and that the officer had asserted the Fifth Amendment numerous times, including in reference to defendant's incident. Defendant also argues that the State improperly allowed the officer to testify he had been "effectively cleared" in all twenty-two cases.

Whether non-disclosure of evidence violates Brady is a mixed question of law and fact, where the trial court's decision concerning the materiality of the evidence merits deference. State v. Marshall, 148 N.J. 89, 185-86 (1997). We do not defer, however, where the trial court did not analyze the claim under the correct legal standard. Id. at 185. Relying in great part on the motion court's pre-trial decision, the trial court mistakenly treated defendant's motion as a claim that the verdict was against the weight of the evidence, requiring deference to the credibility determinations of the jury and clear and convincing evidence of a manifest denial of justice. See R. 3:20-1. To be successful in a Brady claim, however, the defendant must show: (1) the State suppressed evidence (2) that was favorable to the defendant and (3) material to the verdict. State v. Nelson, 155 N.J. 487, 497 (1998). Even an inadvertent failure to disclose evidence may violate Brady. State v. Brown, 236 N.J. 497, 519 (2019).

The State is deemed to have suppressed evidence when it had either actual or imputed knowledge of the materials. Nelson, 155 N.J. at 498. Knowledge is attributed to the trial prosecutor when the evidence is in the possession of "the prosecutor's entire office ..., as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." Id. at 499 (quoting Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 824 (10th Cir. 1995)) (alteration in original).

Chief White's and Captain Barnhart's statements, which they made a few months before defendant's trial, demonstrate that the ACPD knew the IA investigations into both defendant's and D.C.'s complaints remained ongoing. Chief White's deposition testimony revealed the police knew that the officer had exercised his right against self-incrimination, and that the FBI had initiated an investigation into the officer. Because ACPD leadership knew of this undisclosed information, their knowledge is imputed to the prosecutor. Therefore, defendant has met the first Brady prong.

***4** The undisclosed evidence is favorable to defendant, as required by the second Brady prong, because it undermines the officer's credibility and raises doubt as to whether defendant was the initial aggressor. That IA investigations into defendant's and D.C.'s incidents remained open would have contradicted the officer's assertion, sanctioned by the motion court, that he had been cleared of all twenty-two complaints. Additionally, knowledge of an FBI investigation into the officer's conduct may have undercut his credibility with the jury.

As for the third, materiality prong, the applicable standard depends on the undisclosed evidence. State v. Carter, 91 N.J. 86, 112 (1982). Where the prosecution knowingly presented perjured testimony, "any reasonable likelihood that the false testimony could have affected the judgment of the jury" will warrant reversal. Ibid. (quoting United States v. Agurs, 427 U.S. 97, 103-04 (1976)). This heightened standard stems from the principle that the State may not obtain a conviction through falsified or tainted evidence or testimony. See State v. Gookins, 135 N.J. 42, 49-51 (1994).

Where the violation consisted of a failure to disclose favorable evidence (whether specifically requested or not), the court must reverse if the non-disclosure precluded "a verdict worthy of confidence." Brown, 236 N.J. at 520 (quoting Nelson, 155 N.J. at 500); Marshall, 148 N.J. at 156. Under this standard, "evidence is material if there is a 'reasonable probability' that timely production of the withheld evidence would have led to a different result at trial." Brown, 236 N.J. at 520 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "Reasonable probability" means "a probability sufficient to undermine confidence in the outcome." Nelson, 155 N.J. at 500 (quoting Bagley, 473 U.S. at 682).

Materiality turns on "the importance of the [evidence] and the strength of the State's case against [the] defendant as a whole." Marshall, 123 N.J. at 200. The significance depends on "the context of the entire record." Brown, 236 N.J. at 518-19 (quoting Marshall, 123 N.J. at 199-200). The context includes "the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Id. at 519.

The State presented false testimony and failed to disclose pertinent impeachment evidence. With the motion court's permission, the officer responded "yes" to defense counsel's question if IA had "cleared" him in all twenty-two cases. Chief White's affidavit and Captain Barnhart's certification demonstrate that, in fact, both D.C. and defendant's investigations remained ongoing. Thus, the officer's statement that he had been "cleared" of all twenty-two allegations was not accurate. We must reverse if it is reasonably likely that the false testimony could have affected the jury's judgment. Carter, 91 N.J. at 112.

The officer, as the prime actor and claimed victim in this incident, was the State's most significant witness. Evidence of pending charges against or an ongoing investigation into a witness is admissible "to show that the State may have a 'hold' of some kind over [the] witness." State v. Parsons, 341 N.J. Super. 448, 458-59 (App. Div. 2001) (holding an ongoing criminal investigation into an officer's misconduct was material under Brady to the defendant's decision to enter a guilty plea). The inconclusiveness of the surveillance footage, together with the officer's history of complaints of excessive force, weakened the State's case, requiring it to persuade the jury of the officer's credibility and character. Whether he remained the focus of investigations for violence—especially against defendant himself—went to the heart of the trial and had the capacity to influence the jury's verdict.

***5** The officer's assertion of his Fifth Amendment privilege numerous times, and the continuing FBI investigation, if known prior to trial, could also have produced a different verdict, considering the significance and admissibility of the information. See Brown, 236 N.J. at 520. New Jersey case law has recognized a constitutional requirement to disclose any information that may reasonably lead to additional evidence discrediting the State's witnesses or contradicting its narrative. See State v. Williams, 403 N.J. Super. 39, 46-47 (App. Div. 2008) (concluding that the State must disclose inadmissible evidence that could lead to related admissible evidence). Here, evidence of a federal investigation into the officer would have been admissible to impeach the officer. The nondisclosure of the officer's many invocations of his right to remain silent, the continuing investigations, and his inaccurate representation that he was instead "cleared" of all allegations requires reversal in these circumstances, where the verdict rested in large part on the credibility of the officer.

II. Speedy Trial.

Defendant also argues for reversal of his conviction due to violation of his right to a speedy trial. A defendant's right to a speedy trial under the United States and New Jersey constitutions, though fundamental, is "necessarily relative." Barker v. Wingo, 407 U.S. 514, 522 (1972) (quoting Beavers v. Haubert, 198 U.S. 77, 87 (1905)); State v. Cahill, 213 N.J. 253, 268 (2013). Whether the State violated this right turns primarily on four factors: (a) the length of delay; (b) reason for the delay; (c) the defendant's assertion of the right; and (d) the resultant prejudice to the defendant. Cahill, 213 N.J. at 264 (citing Barker, 407 U.S. at 530). A court must balance all the factors in assessing whether the right was violated. Ibid. Some delays, such as those exceeding one year, are "presumptively prejudicial" and trigger the court's consideration of the remaining factors. Ibid. (quoting Barker, 407 U.S. at 530).

Not all reasons for a delay weigh equally against the State. For example, while a deliberate delay to hamstring the defense will weigh heavily in favor of finding a violation, mere negligence by the State or an outsized caseload will weigh less heavily—although the State remains ultimately responsible to move cases along in a timely manner. Id. at 266. While a defendant has no duty to assert his right to a speedy trial, asserting the right "in the face of continuing delays is a factor entitled to strong weight when determining whether the state has violated the right." Ibid. The prejudice that a defendant suffers from a delayed trial may include the psychological stress of a pending charge, possible "impairment of the defense" (such as due to a witness's absence or inability to recall), or "oppressive incarceration." Id. at 266.

Defendant's trial began September 21, 2016, three years and four months after the May 28, 2013 superseding indictment, and five years, eight days after the brawl. Because the delay ran longer than one year, it triggers consideration of the other factors. After careful review of the record, we are satisfied that the delay stemmed from numerous factors, frequently caused by defendant, his co-defendant or their counsel. The complicated legal and factual issues and numerous motions also created a lengthy process.

Defendant moved for dismissal claiming violation of his right to a speedy trial for the first time in February 2016, about six months before trial began. His delay in asserting the right suggests the deprivation was not serious, although he claims,

without documentation, that an important defense witness moved out of the country.

Together, the Barker factors do not support defendant's claim of a violation of his right to a speedy trial. Both the defense and the State had a part in causing the delay, and the State-caused postponements stemmed from neutral factors, not bad faith. Defendant cannot demonstrate any substantial prejudice the delay occasioned him. He was not incarcerated pending trial. We therefore do not reverse based on speedy trial grounds.

***6** Because defendant did not receive important information from the State concerning investigations still pending against a crucial State witness, however, we are constrained to reverse.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2019 WL 3183647

Footnotes

1 We use initials to protect his privacy.
2 He was indicted with a co-defendant who is not involved in this appeal.
3 The judge who heard the pre-trial motion did not try the case.
4 Giglio v. United States, 405 U.S. 150 (1972).
5 On appeal, defendant does not brief his argument concerning after-discovered evidence so we deem that issue abandoned. Morris v. T.D. Bank, 454 N.J. Super. 203, 206 n.2 (App. Div. 2018).

2017 WL 1737906
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Kwadir FELTON, Defendant–Appellant.

DOCKET NO. A–0062–14T3
|
Argued March 2, 2017
|
Decided May 4, 2017

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 11–05–0043.

Attorneys and Law Firms

David A. Gies, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Gies, on the briefs).

Emily R. Anderson, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Anderson, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Before Judges Lihotz, Hoffman and Whipple.

Opinion

PER CURIAM

***1** Defendant Kwadir Felton appeals from a May 29, 2014 judgment of conviction after a jury trial. We affirm defendant's conviction and defendant's sentence except we discern the trial judge failed to explain the basis for the consecutive sentences imposed on counts thirty-three and thirty-five, requiring we vacate these sentences and remand for resentencing. Finally, we require the judgment of conviction be corrected to properly recite the statute under which defendant was convicted on count thirty-three.

On May 19, 2011, defendant was indicted for second-degree conspiracy to launder money and sell PCP, heroin, and marijuana, *N.J.S.A.* 2C:5–2; second-degree possession of a weapon for an unlawful purpose during a drug distribution conspiracy, *N.J.S.A.* 2C:2–6 and *N.J.S.A.* 2C:39–4(a)(2); second-degree unlawful possession of a weapon, as a principal or an accomplice, *N.J.S.A.* 2C:2–6 and *N.J.S.A.* 2C:39–5(b); second-degree possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a)(1); and fourth-degree aggravated assault, *N.J.S.A.* 2C:12–1(b)(4). On November 14, 2013, after hearing the following summarized testimony, the jury returned a guilty verdict on all counts.

In July 2009, the Jersey City Police Department (JCPD) and New Jersey State Police (NJSP) initiated an undercover investigation of a narcotics distribution network involving Dempsey Collins, David Gilliens, Rasheed Boney, and others in Jersey City. JCPD Detective Rebecca Velez and Sgt. Thomas McVicar were assigned to the investigation. Velez, the lead detective, was engaged in undercover narcotic buys, while McVicar was supervisor of the surveillance team. Beginning in December 2009, a surveillance team began monitoring phone lines registered to Gilliens and Collins. Police heard the name "Kwa" mentioned in phone calls and heard someone identified as Kwa speak during some calls. On one call, Kwa discussed his inventory of drugs with Collins. On another, Collins told Gilliens Kwa was outside selling drugs. Kwa informed Gilliens on another call how much heroin he had. It was not until January 10, 2010, the police identified Kwa as defendant.

On January 10, 2010, McVicar learned a suspected drug sale was about to occur in the area of the ring's "headquarters" that would involve Collins' red Acura TL. McVicar parked his truck across the street from an unoccupied red Acura. McVicar had a JCPD radio, a NJSP radio, his personal cell phone, and a department-issued Nextel push-to-talk "chirp" phone. From where McVicar was parked, he could see the Acura through his windshield. The windshield and front side windows of McVicar's truck were not tinted, but the rear windows had a tint.

McVicar locked the doors of his truck, placed the keys in the center console, and climbed into the backseat of his truck and sat "longways" across the bench seat. He rested his head against the rear side window behind the driver's seat. McVicar was wearing his police badge around his neck and he had his .45 caliber handgun in the holster.

***2** McVicar testified he observed a black SUV pull up alongside the red Acura. Collins exited the SUV and

proceeded to go back and forth between the Acura and the SUV, until the SUV drove away. After a few minutes, Collins drove away in the red Acura with Gilliens. While McVicar waited to see if the Acura returned, he sensed someone was behind him. When he turned slightly to look out the window, he noticed defendant leaning against the driver's side window of the truck looking in to the truck crossways. McVicar testified he "tried to get a hold of the State police radio" but "was a little freaked out" because he had not heard or seen anyone approach his truck. His police radio fell to the floor of the truck, startling defendant. McVicar testified defendant then looked fully into the rear window, bent down from his view, and McVicar "heard the racking of the slide of a ... pistol."

According to McVicar, defendant "stood back up and reappeared" in the driver side window with the gun held up against his chest and started looking in to the windows. McVicar took his gun out of his holster and testified defendant looked straight through the driver side window and pointed the firearm into the interior of the car towards him. Fearing for his life, McVicar aimed his gun at defendant and fired one shot striking defendant's head. McVicar exited his truck from the passenger side door and found defendant lying on the ground with a gunshot wound to his head. A .9 millimeter handgun was lying next to him. McVicar radioed dispatch for an ambulance.

JCPD Sergeant Joseph Sarao arrived within seconds of McVicar's call. Sarao testified when he arrived, defendant was lying on the ground near the front of McVicar's truck bleeding from a gunshot wound to his temple. Sarao observed broken glass on the ground, McVicar's truck window was shattered, and there was a gun on the ground near defendant's head. Jersey City Emergency Medical Services transported defendant to the hospital.

Following the shooting, numerous phone calls were intercepted between Gilliens, Collins and others discussing defendant's shooting and conferring what to do because defendant had "the other ratchet." [1] Collins directed one of his confederates to go to the hospital to see what happened but cautioned him to leave his gun in his vehicle before entering the hospital. Police arrested several individuals outside the hospital and found a .40 caliber handgun inside their vehicle. More intercepted calls between Collins and Gilliens contained discussions about defendant's possession of a handgun and narcotics. Gilliens called defendant's mother and told her defendant would receive bail money if she did not have it, and asked if defendant had a lawyer and said to call him if anything happens. Sergeant Keith Ludwig of the JCPD testified to the contents of a January 13, 2010, wiretap recording where Collins asked someone if they wanted to "get[ ] some weed from Kwa." Defense counsel underscored, and Ludwig agreed, defendant was in the hospital when this call occurred. However, Ludwig testified when a runner was arrested, Collins and Gilliens typically tried to recover the runner's "stash" of drugs. Numerous other state and defense witnesses testified regarding procedures, the subsequent police investigation, and ballistics testing from the shooting. Other witnesses offered ballistics and fingerprint testimony.

Defendant testified that on January 10, 2010, he attended church in the morning, went to the park, and then went to the store for a neighbor. Defendant met a friend inside a neighbor's apartment building, where the police stopped the two, frisked them, and let them go. From there, he attended a baby shower where he walked through a metal detector and security patted him down. Defendant testified police were present at the center where the shower was held. After the shower, defendant helped load gifts and food into cars and then walked towards a corner store.

***3** As defendant turned the corner, he heard a voice yell: "Hey, yo Kwa. Yo Kwa." Defendant testified he saw a red truck with tinted windows. Defendant said "Who that," and the person responded, "Look, you little black mother fucker, you better get the fuck down before I blow your fuckin' brains out." Defendant testified the driver side window was open about four to five inches. Defendant yelled back, "Who's that?" but no one responded, so he said, "suck my dick."

Defendant testified he felt as if someone punched him and he fell to the ground. He sat up and realized someone shot him. Defendant testified his vision was fading but he saw someone get out of the driver-side door of the truck. Defendant described the man as a "heavyset guy, fat, with a fat face," and he thought he was black. Defendant felt someone push him to the ground with force and kick his leg. Someone took his hood and hat off his head and searched his pockets. Defendant's next memory was waking up in the hospital, handcuffed to the bed.

Defendant denied selling drugs for Collins or Gilliens. He testified he had been friends with Boney as a child but their relationship faded away because Boney was selling drugs. Defendant recounted when Boney had shown defendant guns and drugs inside his car and defendant refused to get in

because "that's not [him]. [He] was raised better than that." Defendant knew Collins and Gilliens through Boney and defendant had helped at Collins' father's barbershop. While defendant did not receive a paycheck, sometimes Collins would give him alcohol or "a bag of weed to smoke" as compensation.

Defendant testified he made phone calls for Collins and Gilliens but denied selling drugs. Defendant testified during one phone call when he told Collins there was no more "product," he meant he had smoked all of the marijuana Collins had given him.

C.J. [2] testified on the day of the shooting, he was sitting on his porch and noticed a person sitting behind the driver's seat of a parked vehicle with the window open. He saw a man walk down the street, who he identified as defendant. C.J. heard a gunshot then saw the man in the vehicle exit the driver's side door and bend down to defendant lying on the ground. C.J. did not see a weapon on the ground, but it was dark outside and the vehicle partially blocked his view.

Defendant's sister testified she attempted to collect bail money from Collins because she and her mother were unemployed, but denied defendant sold drugs for Collins and Gilliens and stated Collins never gave her bail money.

Defendant moved for a new trial, arguing the prosecutor's summation resulted in an unjust verdict and the verdict was unsupported by the evidence. On January 10, 2014, the court denied defendant's motion.

In March 2014, defendant filed a second motion for a new trial, this time arguing two jurors failed to provide relevant background information during voir dire. The judge rejected the arguments concerning juror ten but determined it was necessary to interview juror one. On March 21, 2014, after interviewing the juror, the court denied the motion as meritless. On May 29, 2014, the court sentenced defendant to an aggregate sixteen-year prison term with a six-year period of parole ineligibility. This appeal followed.

On appeal, defendant raises the following arguments:

POINT ONE

THE TRIAL COURT'S ATTEMPT TO CURE THE PROSECUTOR'S CLEARLY AND UNMISTAKABLY IMPROPER COMMENTS DURING SUMMATION FAILED TO CORRECT THE ERROR SO THAT THE DEFENDANT WAS DENIED A FAIR TRIAL.

***4** POINT TWO

THE DEFENDANT WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE ON JUROR 1 IF HE HAD KNOWN OF THE JUROR'S FAMILIARITY WITH HIS RELATIVES AND THE CRIME SCENE.

POINT THREE

NOT ONLY DID THE TRIAL COURT ERR WHERE IT IMPROPERLY INSTRUCTED THE JURY REGARDING COUNT 33, BUT NO EVIDENCE WAS PRESENTED TO CREATE A TEMPORAL AND SPATIAL LINK BETWEEN THE FIREARM AND THE DRUGS.

POINT FOUR

THE VERDICT AS TO THE CONSPIRACY ALLEGED IN COUNT 2 WAS AGAINST THE WEIGHT OF THE EVIDENCE AND SHOULD BE SET ASIDE.

POINT FIVE

THE TRIAL COURT SHOULD HAVE MERGED COUNT 33 INTO COUNT 2 WHERE THE USE OF THE WEAPON TO COMMIT THE SUBSTANTIVE OFFENSE PROVIDED THE FACTUAL UNDERPINNING FOR DRAWING AN INFERENCE THAT THE WEAPON WAS POSSESSED FOR AN UNLAWFUL PURPOSE.

POINT SIX

THE TRIAL COURT'S FAILURE TO ARTICULATE ITS REASON FOR IMPOSING THREE CONSECUTIVE TERMS IS AN ABUSE OF DISCRETION.

POINT SEVEN

THE DEFENDANT'S SENTENCE WAS INAPPROPRIATE WHERE THE TRIAL COURT FAILED TO ARTICULATE ITS REASONS FOR FINDING THE SOLE AGGRAVATING FACTOR OUTWEIGHED THE TWO APPLICABLE MITIGATING FACTORS.

Defendant raised the following issues in a pro se supplemental brief:

POINT I

THE TRIAL COURT COMMITTED PLAIN ERROR IN THE JURY INSTRUCTION AS TO "A COMMUNITY GUN" PURSUANT TO *N.J.S.A.* 2C:39–4(A)(2) (SUPPLEMENTAL TO COUNSEL'S POINT III).

POINT II

THE TRIAL COURT'S ABUSE OF DISCRETION DURING APPELLANT['S] MOTION TO COMPEL RELEVANT INFORMATION OF SGT. THOMAS MCVICAR['S] INTERNAL AFFAIRS RECORDS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS.

POINT III

THE TRIAL COURT'S ABUSE OF DISCRETION VIOLATED APPELLANT'S RIGHT[S] DURING A NEW TRIAL MOTION TO DUE PROCESS A VIOLATION OF THE FOURTEENTH AMENDMENT [sic].

A. BEING PRESENT ACCORDING TO NEW JERSEY SUPREME [COURT] *RULE* 3:16(B) FOR A NEW TRIAL MOTION

B. FAILURE TO MAKE A RECORD OF THE IN CAMERA INTERVIEW ACCORDING TO NEW JERSEY SUPREME [COURT] *RULE* 1:2–2, VERBATIM RECORD OF PROCEEDING

I.

We first address defendant's argument that statements made by the prosecutor during summation substantially prejudiced his right to a fair trial and the trial court erred in its curative instruction, requiring reversal of defendant's conviction.

Reversible error occurs when a prosecutor makes a comment so prejudicial that it deprives a defendant of his or her right to a fair trial. *State v. Mahoney*, 188 *N.J.* 359, 376, *cert. denied*, 549 *U.S.* 995, 127 *S. Ct.* 507, 166 *L. Ed.* 2d 368 (2006). Moreover, the prosecutor can make fair comments about the evidence presented. *State v. Atwater*, 400 *N.J. Super.* 319, 335 (App. Div. 2008).

After reviewing the record, we reject defendant's argument. When assessing whether prosecutorial misconduct requires reversal we must determine whether "the conduct was so egregious that it deprives the defendant of a fair trial." *State v. Loftin*, 146 *N.J.* 295, 386 (1996) (quoting *State v. Ramseur*, 106 *N.J.* 123, 322 (1987)). We consider such factors as whether defense counsel made a timely objection, whether the remark was withdrawn promptly, whether the trial judge ordered the remarks stricken, and whether the judge instructed the jury to disregard them. *Ramseur*, *supra*, 106 *N.J.* at 322–23. While prosecutors are given "considerable leeway" in summarizing their case to the jury, prosecutors may not make "inaccurate legal or factual assertions" and must "confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence." *State v. Smith*, 167 *N.J.* 158, 177–78 (2001) (citations omitted).

***5** At the start of the prosecutor's summation, he said:

> Now, I have—there was a lot of things here, throughout the trial. And one of the things is that Ms. Barnett, defense counsel, she like[s] to misstate facts. She like[s] to manipulate the facts. She doesn't think very highly of myself as a Prosecutor, doesn't think very highly of the Court, or even yourself as the jurors.

Defense counsel objected; however, the prosecutor continued until the trial judge chastised the prosecutor at sidebar. Defense counsel requested a limiting instruction, and the court instructed the jury, "to disregard any comment that [defense counsel] does not respect this Court or yourselves."

The prosecutor's comments were not based on the evidence in the record nor inferences that could be drawn from the evidence. *See Smith*, *supra*, 167 *N.J.* at 178. However, the trial court appropriately addressed the impropriety immediately after it occurred. While the court could have expanded the instruction to clarify the comment was improper and the jury had to decide the case based solely on the evidence at trial, the court's failure to do so does not warrant reversal. The comment was not so egregious as to deny defendant a fair trial. *See State v. Frost*, 158 *N.J.* 76, 83 (1999).

Later, the prosecutor criticized the manner in which defense counsel cross-examined Sarao. He said,

> She [defense counsel] mentioned to you the testimony that came out of him [Sarao]. This is the transcript from that testimony ... [defense counsel] asked these questions with regards to the .9 millimeter. Okay?
>
> The question is: "Okay. Now, it was your testimony, though Sergeant, that you had directed an officer—who-who-who you can't recall his name, take the—this .9 millimeter to the South District. Correct?"
>
> Answer, ... "Not that gun, McVicar's gun."
>
> Okay? We wanted to start confusing the .9 millimeter, the .45 and the .40 caliber. Of course, from members, including myself, who are not familiar with guns, absolutely. Three guns? It would confuse anybody. But here it is.
>
> Question by—by [defense counsel]. "Okay. ... so it's your testimony that you don't know who took the .9 millimeter? What happened to the .9 millimeter? What happened to this gun? This gun, right here, the .9 millimeter?"

The prosecutor continued:

> Ms. Barnett, as if she quite—didn't quite understand it up until this point. "So, just for clarification, it's your testimony that it wasn't the .9 millimeter that was taken down. You indicated on direct examination .... Fennell was the one who watched the gun." "The gun?" "Yes." "This gun right here?"
>
> Answer: "The defendant's gun."

The prosecutor then added, "Okay? Let's not misstate the facts."

Defense counsel did not object to these comments; therefore, we review the statement under the plain error standard pursuant to *Rule* 2:10–2. Defendant argues these comments constituted improper personal attacks directed at defense counsel. However, the prosecutor read the transcript to dispel the notion police mishandled the weapons after the shooting. The prosecutor's remarks here were based on evidence at trial, constituting comment on defendant's theory of the case, and did not deprive defendant of a fair trial. *See Smith*, *supra*, 167 *N.J.* at 178–82.

***6** The additional comments defendant challenges also concerned defendant's theory "five different [law enforcement] agencies" had conspired to frame him and used confidential informants to do so, and his challenges to the credibility of the police witnesses. Defense counsel did not object to these comments at trial.

As to these and the remaining comments defendant challenges, we conclude the remarks did not deny defendant a fair trial, as the prosecutor was responding to remarks made by defense counsel in her summation. *See State v. DePaglia*, 64 *N.J.* 288, 297 (1974).

II.

Next, we address defendant's argument he was denied a fair trial because juror one failed to provide relevant information during voir dire, which would have prompted defendant to exclude her from the jury with a peremptory challenge. Defendant also alleges the court denied him due process and the right to be present for a critical proceeding when the court issued its decision on the record without defendant's presence and when it held an in camera interview of juror one. We disagree.

After the trial, defendant's sister saw a picture on social media. Defendant's sister recognized the woman in the picture as juror one. According to defendant's investigator, one of defendant's acquaintances and juror one, the acquaintance's grandmother, live at the same address. The acquaintance and defendant have a number of mutual friends. Defendant moved for a new trial.

The judge conducted an in camera hearing, where juror one reported she had not lived in the same house as defendant's acquaintance for several years and did not know of defendant prior to trial. She also reported while on the jury, she did not discuss the trial or defendant with her granddaughter. Finding no juror misconduct, the court denied defendant's motion for a new trial.

A court should grant a motion for a new trial only if the defendant's submissions "clearly and convincingly" establish "a manifest denial of justice." *R.* 3:20–1; *State v. Loftin*, 287 *N.J. Super.* 76, 107 (App. Div.), *certif. denied*, 144 *N.J.* 175 (1996). A trial court's ruling on a motion for new trial "shall not be reversed unless it clearly appears that there was a

miscarriage of justice." *State v. Perez*, 177 *N.J.* 540, 555 (2003) (quoting *R.* 2:10–1).

Defendant argues he would have exercised a peremptory challenge to remove juror one from the jury if he had known about the connection to defendant's acquaintance, and therefore, he was unfairly denied the opportunity to exercise a peremptory challenge.

"When a juror incorrectly omits information during voir dire, the omission is presumed to have been prejudicial if it had the potential to be prejudicial." *State v. Cooper*, 151 *N.J.* 326, 349 (1997) (citation omitted). The Court in *In re Kozlov*, 79 *N.J.* 232, 239 (1979), explained:

> Where a juror on *voir dire* fails to disclose prejudicial material ... a party may be regarded as having been denied [a] fair trial. This is not necessarily because of any actual or provable prejudice to his case attributable to such juror, but rather because of his loss, by reason of that failure of disclosure, of the opportunity to have excused the juror by appropriate challenge, thus assuring with maximum possible certainty that he be judged fairly by an impartial jury.

Here, juror one did not withhold relevant information during jury selection. She reported she had no knowledge of defendant prior to trial, nor did she know her granddaughter knew him. Therefore, juror one did not withhold any relevant information and defendant was not denied a fair trial.

***7** Defendant further argues the court denied him due process and the right to be present at two court proceedings, the March 21, 2014 decision denying his second motion for a new trial and the in camera hearing of juror one.

The right to be present at trial is grounded in the Confrontation Clause of the Constitution. *State v. Trent*, 157 *N.J. Super.* 231, 241 (App. Div. 1978), *rev'd on other grounds*, 79 *N.J.* 251 (1979). However, the right to be present is not unlimited. *Ibid.* The right to be present

> extends not to every aspect of the proceeding but rather only to critical stages of the trial, heretofore defined by the Supreme Court as "anything ... new to the proceeding and in conflict with ... [the] right to be confronted by the witnesses, to be represented by counsel, and to maintain ... [the] defense upon the merits."
>
> [*Ibid.* (quoting *State v. Auld*, 2 *N.J.* 426, 433 (1949)).]

A defendant may be excluded from an in camera interview without offending the right to be present, particularly if the defendant did not request to be present, if the issue "was singularly one whose investigation and resolution may well have been impeded by defendant's presence," and the defendant was not prejudiced by the absence. *Ibid.*

Here, defendant was not denied due process or the right to be present. At the March 21, 2014 decision, no witnesses were present, no counsel were present, no arguments were made, and the judge did nothing more than read her decision into the record. Defendant did not miss a critical stage of the trial by not being present when the court issued its decision denying his motion for a new trial. Defendant also had no right to be present for the in camera hearing of juror one. We discern no reason defendant should be entitled to a new trial as his due process rights were not violated.

III.

Defendant argues the court erred by charging the jury on *N.J.S.A.* 2C:39–4.1(a), possession of a weapon during the distribution of controlled dangerous substance (CDS) or a conspiracy to distribute CDS, when the original count charged possession of a community weapon, contrary to *N.J.S.A.* 2C:39–4(a)(2). Because the State moved to amend the indictment, and defense counsel did not object to changing the statute cited from *N.J.S.A.* 2C:39–4(a)(2) to *N.J.S.A.* 2C:39–4.1(a) prior to trial, defendant's argument the court charged the jury with the wrong statute is meritless. However, the judgment of conviction erroneously cited *N.J.S.A.* 2C:39–4(a)(2) as the statute applicable to that count; therefore, we remand to the trial court to correct the error.

Additionally, defendant argues the State failed to prove he was acting as part of a conspiracy to commit a narcotics offense at the moment he was shot and found in possession of a firearm in order to satisfy a conviction under *N.J.S.A.* 2C:39–4.1(a). *N.J.S.A.* 2C:39–4.1(a) states, "Any person who

has in his possession any firearm while in the course of committing, attempting to commit, or conspiring to commit a [narcotics offense] ... is guilty of a crime of the second degree." There must be "a temporal and spatial link between the possession of the firearm and the drugs that defendant intended to distribute." *State v. Spivey*, 179 *N.J.* 229, 239 (2004). Defendant argues the only evidence offered in support of the conspiracy charge were a few telephone conversations in which he allegedly participated. He underscores his full name was never used in the calls, only the name "Kwa," and prior to the shooting, he was not a suspect in the drug ring.

***8** The court did not err in finding that the conspiracy conviction was supported by the evidence. *N.J.S.A.* 2C:5–2(a) provides:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Subsection (d) provides that while an overt act in furtherance of the conspiracy is usually required to establish the crime, that is not the case for conspiracy to distribute drugs. *N.J.S.A.* 2C:5–2(d).

Here, police recorded telephone calls between defendant and members of the drug ring discussing drug sales. The jury listened to the calls at trial and during deliberations. The jury evidently rejected defendant's contention he was either relaying messages for his friends or asking Collins for marijuana to smoke, and not to sell. Nothing in the record suggests that the jury erred or the jury's verdict as to count two, conspiracy pursuant to *N.J.S.A.* 2C:5–2, is against the weight of the evidence and should be set aside.

IV.

Defendant argues the trial court erred by denying his request for discovery of McVicar's personal and internal affairs records. We disagree.

"The Sixth Amendment to the United States Constitution and Article 1, Section 10 of the New Jersey Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *State v. Harris*, 316 *N.J. Super.* 384, 397 (App. Div. 1998) (quoting *Davis v. Alaska*, 415 *U.S.* 308, 315, 94 *S. Ct.* 1105, 1110, 39 *L. Ed.* 2d 347, 353 (1974)). That right, however, "does not require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ibid.*

In requests for police personnel records, the court must balance "the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-examination under the Confrontation Clause." *Id.* at 397–98 (citation omitted). Therefore, the party who requests an in camera inspection "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.' " *Id.* at 398 (quoting *State v. Kaszubinksi*, 177 *N.J. Super.* 136, 139 (Law Div. 1980)).

The trial court denied the request for McVicar's records because defendant failed to present a factual predicate for them. Defendant's position was the records could provide relevant information to support the theory McVicar was the initial aggressor. Defendant contends McVicar's records were relevant to McVicar's credibility and to establish whether he had a pattern of excessive force. However, defendant did not present a factual basis to support his request; therefore, we find the trial court properly denied defendant's request for discovery as to personnel and internal affairs records.

V.

***9** Defendant argues the court erred in failing to merge count thirty-three, *N.J.S.A.* 2C:39–4.1(a), into count two, *N.J.S.A.* 2C:5–2. We disagree.

Because defendant did not raise this issue below, we review it under the plain error standard and will only address it if "it is of such a nature as to have been clearly capable of producing an unjust result." *R.* 2:10–2.

The merger doctrine prevents a defendant from receiving multiple punishments for a single wrongdoing. *State v. Tate*,

216 *N.J.* 300, 302 (2013). In deciding whether to merge offenses, our Court explained,

> [w]e follow a "flexible approach" ... that "requires us to focus on the 'elements of the crimes and the Legislature's intent in creating them,' and on 'the specific facts of each case.' " *State v. Cole*, 120 *N.J.* 321, 327 (1990) (quoting *State v. Miller*, 108 *N.J.* 112, 116–17 (1987)). The overall principle guiding merger analysis is that a defendant who has committed one offense " 'cannot be punished as if for two.' " *Miller*, *supra*, 108 *N.J.* at 116 (quoting *State v. Davis*, 68 *N.J.* 69, 77 (1975)). Convictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge.
>
> [*State v. Brown*, 138 *N.J.* 481, 561 (1994).]

Defendant argues count thirty-three should have merged into count two because the two crimes constituted a single wrongdoing. We disagree. Count thirty-three and count two require different elements. Count thirty-three, *N.J.S.A.* 2C:39–4.1(a), requires possession of a firearm in the course of committing, attempting to commit, or conspiring to commit a narcotics offense. Count two, *N.J.S.A.* 2C:5–2(a), does not require the possession of a weapon to find a conspiracy to sell drugs. Thus, count thirty-three required a proof in addition to the proofs required for count two.

Defendant erroneously argues the anti-merger provision in *N.J.S.A.* 2C:39–4.1(d) is not applicable because the indictment charged him with *N.J.S.A.* 2C:39–4(a)(2), not *N.J.S.A.* 2C:39–4.1, and he was not convicted of a crime under chapter 35 or chapter 16, to which *N.J.S.A.* 2C:39–4.1(d) applies. *N.J.S.A.* 2C:39–4.1(d) states, in relevant part, "a conviction arising under this section shall not merge with a conviction for a violation of any of the sections of chapter 35 or chapter 16 referred to in this section nor shall any conviction under those sections merge with a conviction under this section." Defendant's argument is meritless, as previously explained, because defense counsel consented to the amendment of count thirty-three of the indictment to *N.J.S.A.* 2C:39–4.1(a). The anti-merger provision in subsection (d) does not preclude merger with a conspiracy conviction because *N.J.S.A.* 2C:5–2(a) is not one of the offenses referred to in *N.J.S.A.* 2C:39–4.1. We find the court did not err by not merging count thirty-three into count two.

VI.

Defendant argues the trial judge erred in sentencing him to three consecutive terms, specifically on counts thirty-three and thirty-five, possession of a weapon for an unlawful purpose, as they should be served concurrently because they were not independent crimes, but rather, occurred at the same time and place. Because the trial judge failed to provide her findings on the record as to why she sentenced defendant to three consecutive terms, we remand.

***10** "[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." *State v. Blackmon*, 202 *N.J.* 283, 297 (2010). We consider whether the trial court has made findings of fact grounded in reasonably credible evidence, whether the factfinder applied correct legal principles in exercising discretion, and whether application of the facts to law has resulted in a clear error of judgment and to sentences that "shock the judicial conscience." *State v. Roth,* 95 *N.J.* 334, 363–65 (1984). We review a trial judge's findings as to aggravating and mitigating factors to determine whether the factors are based on competent, credible evidence in the record. *Id.* at 364. "To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." *State v. Case*, 220 *N.J.* 49, 65 (2014); *see R.* 3:21–4(g).

Pursuant to *N.J.S.A.* 2C:44–5(a), when a defendant receives multiple sentences of imprisonment "for more than one offense, ... such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." *N.J.S.A.* 2C:44–5(a) does not state when consecutive or concurrent sentences are appropriate. The Supreme Court in *State v. Yarbough*, 100 *N.J.* 627, 643–44 (1985), *cert. denied*, 475 *U.S.* 1014, 106 *S. Ct.* 1193, 89 *L. Ed.* 2d 308 (1986), set forth the following guidelines:

> (1) there can be no free crimes in a system for which the punishment shall fit the crime;
>
> (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
>
> (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominately independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense[.]

What was guideline six was superseded by a 1993 amendment to *N.J.S.A.* 2C:44–5(a), which provides that there "shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses."

The *Yarbough* guidelines leave a "fair degree of discretion in the sentencing courts." *State v. Carey*, 168 *N.J.* 413, 427 (2001). "[A] sentencing court may impose consecutive sentences even though a majority of the *Yarbough* factors support concurrent sentences," *id.* at 427–28, but the court must state its reasons for imposing consecutive sentences, and when a court fails to do so, remand is needed in order for the court to place its reasoning on the record, *State v. Miller*, 205 *N.J.* 109, 129 (2011). Here, the only reasoning provided by the court was that *N.J.S.A.* 2C:39–4.1(d) required the sentence on count thirty-three to be served consecutive to count two. [3] Because the distribution of CDS is among the chapter 35 offenses required to run consecutively pursuant to *N.J.S.A.* 2C:39–4.1(d), the court correctly found count two and count thirty-three were to run consecutively.

As to count thirty-five and count thirty-three, the court provided no reasons for why those two counts were to run consecutively. Count thirty-five, *N.J.S.A.* 2C:39–4A, is not within the enumerated offenses in *N.J.S.A.* 2C:39–4.1(d), which requires the two counts to run consecutively. Because the record does not explain why the court ran the two counts consecutively, we remand for resentencing.

***11** At sentencing, the court noted the shooting left defendant blind, but stated, "I don't sentence people based upon who they are in front of me today, I consider who they are in front of me today, but I need to sentence based on crimes." The court found mitigating factors seven, defendant led a law-abiding life, and eight, defendant's conduct was unlikely to reoccur, as well as aggravating factor nine, the need for deterrence. The court found aggravating factor nine outweighed the mitigating factors "because ... it is a qualitative, not a quantitative, under the circumstances, and the charge and the nature of the offense, I do find that the aggravating factor outweighs the mitigating [factors]." The court did not explain its basis for reaching that conclusion.

A sentencing court may find aggravating and mitigating factors that appear internally inconsistent, but the court must support the findings with a "reasoned explanation" "grounded in competent, credible evidence in the record." *Case*, *supra*, 220 *N.J.* at 67. Specifically, as to a finding of aggravating factor nine and mitigating factor eight, it must "specifically explain[ ]" why the court found the need to deter defendant outweighed whether defendant's conduct was unlikely to reoccur based upon the circumstances. *See State v. Fuentes*, 217 *N.J.* 57, 63 (2014).

The trial court also failed to consider the two parts of aggravating factor nine, the general and specific need to deter. A sentencing court must qualitatively analyze the risk of both general and specific deterrence in relation to the particular defendant. *Id.* at 78. The trial court did not discuss any reason for finding aggravating factor nine besides "there is always a need to deter [defendant] and others from violating the law." That we must always deter people from violating the law is not enough of analysis to satisfy a sentencing court's obligation to provide a reasoned explanation for why an aggravating factor applies.

Affirmed as to defendant's conviction and sentence except as to counts thirty-three and thirty-five, where we vacate and remand for resentencing for the trial judge to explain the basis for imposing consecutive sentences. We also remand for the trial court to correct the judgment of conviction to recite the statute under which defendant was convicted on count thirty-three. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2017 WL 1737906

Footnotes

1 According to police testimony "ratchet" is slang for gun.

2 We use initials to protect the identity of non-party witnesses.

3 Defendant again attempts to argue he was never charged with *N.J.S.A.* 2C:39–4.1(a), however, as mentioned twice previously, defense counsel consented to the State amending count thirty-three of the indictment to replace *N.J.S.A.* 2C:39–4(a)(2) with *N.J.S.A.* 2C:39–4.1(a).

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Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Eric E. POTTER, Defendant–Appellant.

A-1175-12T3
|
Submitted March 18, 2015.
|
Decided June 23, 2015.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 10–08–1447.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Kevin G. Byrnes, Designated Counsel, on the brief).

Christopher J. Gramiccioni, Acting Monmouth County Prosecutor, attorney for respondent (Paul H. Heinzel, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges WAUGH, MAVEN, and CARROLL.

Opinion

PER CURIAM.

***1** Defendant Eric E. Potter appeals his conviction for third-degree possession of a controlled dangerous substance, *N.J.S.A.* 2C:35–10(a)(1) (count one); second-degree possession of heroin in a quantity of one-half ounce or more with the intent to distribute, *N.J.S.A.* 2C:35–5(b)(2) (count two); and third-degree possession of heroin with the intent to distribute within 1000 feet of a school, *N.J.S.A.* 2C:35–7 (count three). We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

A.

On the evening of April 26, 2010, Officer Eddy Raisin of the Street Crimes Unit (Unit) of the Asbury Park Police Department met with a confidential informant who had provided reliable information in the past. The informant told him that Potter was known to walk from the Vita Garden Apartments in Asbury Park during the early morning hours to a house on Bangs Avenue, where he would play poker on the second floor and sell heroin. To reach Bangs Avenue, he would cut through a municipal basketball court.[1] The informant provided a physical description of Potter.

Shortly before 10:00 a.m., on April 27, Raisin met at police headquarters with other members of his Unit, including Lieutenant David Desane, Officer Lorenzo Pettway, Officer Adam Mendes, and Officer Kamil Warraich, as well as members of the Monmouth County Narcotics Strike Force, including Detectives Todd Rue, Scott Samis, and Christopher Camilleri. After the meeting, they set up surveillance sites at the basketball court, Bangs Avenue, and the street connecting the two, using unmarked police cars.

Warraich and Camilleri's vehicle was in a parking lot near the basketball courts. Raisin and Mendes were on the connecting street and had a clear view of the basketball courts. Desane, Samis, and Pettway positioned their vehicle so they could view the house on Bangs Avenue, but they could not observe the basketball court from their location.

At approximately 11:40 a.m., Raisin observed a man matching Potter's description heading from the Vita Garden Apartments toward the basketball courts. Raisin immediately told Warraich to drive toward the basketball courts and approach Potter.

Warraich and Camilleri left the parking lot, drove closer to the courts, and parked. They got out of the vehicle and approached Potter. While doing so, Warraich positioned himself to Potter's right side and Camilleri positioned himself to the left. Warraich asked Potter for his name and what he was doing in the area.

Before Potter answered, Warraich observed a clear, "Ziploc[-]type" plastic bag in the front right pocket on the outside of Potter's jacket. Although the bag was inside the pocket, it was visible because the bag created a bulge that kept the pocket open. Warraich could also see the packages in the bag, which were wrapped in paper and shaped like a small brick.

Based on his training and experience, including having "seen plenty of bricks of heroin," Warraich concluded that the bag contained drugs.[2] Warraich immediately placed Potter under arrest and removed the plastic bag from his pocket. The bag contained several bricks of what was subsequently identified as heroin. A search incident to the arrest uncovered a second plastic bag in Potter's left pocket that also contained several bricks of what proved to be heroin. Nine unbundled packets of heroin were also recovered. Following his arrest, Potter was transported to police headquarters, where another search revealed that Potter was carrying $1520 in cash.

***2** Warraich turned the plastic bags and nine loose packets over to Officer Raisin. In his investigation report, Raisin recorded his inventory of the two bags. One of them contained 498 glassine packets, 298 of which bore the stamp "Candy Girl," 150 of which were stamped "Extra Power," and 50 of which were stamped "Knockout." The other bag held 350 glassine packets, 150 of which were stamped "Candy Girl," 150 of which bore the stamp "Extra Power," and 50 of which were stamped "Knockout."

At police headquarters, Potter was interviewed by Samis and Raisin. The interview was videotaped and transcribed. Before the start of the interview, Samis informed Potter of his *Miranda*[3] rights. Potter initialed a *Miranda* form acknowledging, among other things, that he was waiving his right to remain silent, his right to consult with an attorney, and his right to have one present during the interview. Potter also acknowledged that he had been informed that his decision to waive his rights was not final and could be revoked at any time during the interview.

During the interview, Potter admitted that he was told by another person to pick up the two bags and deliver them to someone he did not identify. There was one buyer for the larger bag for $2500 and another for the smaller bags for around $1800. Potter expected to receive $300 for facilitating the transactions. He told the officers that he had four or five customers and was averaging a couple of bundles a day in sales. He also asserted that the quantity he had with him that day was a lot more than he usually sold. Potter maintained that he used the money to buy food and support himself.

At the end of the interview, Samis told Potter that they would "let [him] make phone calls" once they found out what the bail amount would be. According to Samis, Potter had not asked to make a phone call prior to that exchange.

B.

Potter was indicted on August 4, and pled not guilty on September 27. He was assigned counsel from the Office of the Public Defender at his arraignment. On December 16, Potter filed a motion seeking to represent himself. Potter's attorney subsequently joined the motion.

At oral argument on April 12, 2011, Potter's attorney advised the judge that Potter had been denied the opportunity to represent himself in a prior case, and that the denial had been reversed on appeal. He also requested the judge explain the risks of self-representation to Potter.

The judge then informed Potter of his right to remain silent and explained that the risks of self-representation included self-incrimination and lack of familiarity with the court rules and the rules of evidence. She questioned Potter about his familiarity with hearsay. Potter responded: "[I]t's just hearsay. It's not no proven fact.... It's just the evidence." He acknowledged having some familiarity with the New Jersey Rules of Evidence. The judge expressed some concern and explained that "there are a lot of technical issues that can come up that an attorney may be able to use to your benefit that you may not be aware of."

***3** Potter explained that he wanted to represent himself because he had a different trial strategy than his appointed counsel, and he felt he was qualified. Potter acknowledged that he had represented himself at trial in the past. Potter also told the judge that he had taken paralegal courses while in prison.

The judge repeatedly expressed her concern about the possible adverse consequences of his decision, but Potter continued to express his desire to represent himself. The judge ultimately allowed Potter to proceed pro se, but with standby counsel.

Potter's attorney had filed a motion to suppress the evidence seized on the day of his arrest. The judge heard some testimony on that issue on April 14. Warraich and Raisin testified for the State. The judge then adjourned the hearing pending disposition of Potter's motion to compel production of the personnel records of certain members of the Asbury Park Police Department and the Monmouth County Prosecutor's Office. That motion was denied on May 12.

The motion to suppress resumed on May 26, with testimony by Camilleri, Samis, Rue, and others. On July 19, following the presentation of additional evidence, the judge placed an oral decision on the record. She found that both Warraich and Camilleri were credible witnesses, and that Warraich was very knowledgeable about the packaging of narcotics. She concluded that Warraich had sufficient reasonable suspicion to warrant an investigative stop. The judge found that Warraich observed Potter carrying drugs in plain view when he sought to question him, which provided probable cause for the arrest and the subsequent search.

Potter filed a motion to dismiss the indictment on August 25. The judge assigned to conduct the trial heard oral argument on the motion on November 3, and issued a written decision and order denying the motion six days later.

On December 2, Potter filed a motion to suppress the statements he made to the police following his arrest, arguing (1) that the police coerced him to make the statement through a promise; (2) that he was suffering from heroin withdrawal at the time; and (3) that he did not know he was being videotaped.

The trial judge conducted a hearing on that motion on March 13, 2012. The following day, he issued an order and a written decision. The judge concluded (1) that Potter had failed to present evidence of the existence of any promise, much less a promise that overbore his will, (2) that there was no evidence presented that he was suffering from heroin withdrawal, and (3) that Potter had no privacy right with respect to his statement because he had been told it would be recorded, if not videotaped.

The trial testimony began on March 21, and continued for three additional days.[4] The officers and detectives involved in the April 27, 2010 operation testified. The State also presented testimony from the property clerk at the Asbury Park Police Department and a forensic scientist from East Regional Laboratory who testified that more than half an ounce of heroin had been seized.

***4** Detective George Snowden of the Monmouth County Narcotics Strike Force was qualified as the State's expert witness on narcotics distribution in Monmouth County. He testified that heroin is typically sold and packaged in a glassine envelope, bag, or "deck" that is "a one by one-and-a-half waxine folded-up envelope with ... a stamp[ed] brand[ ] on it." According to Snowden, a glassine packet typically contains between .01 and .05 grams of heroin and costs between $3 and $10 a bag. The price varies based on the neighborhood, the relationship between the buyer and seller, and the quantity being purchased.

Snowden explained that a bundle of heroin consists of ten glassine packets bound together by a rubber band. A brick of heroin is a larger unit consisting of five bundles (fifty packets of heroin), wrapped in newspaper, magazine paper, or white paper, but most commonly magazine paper. Large quantities of heroin are typically distributed in bricks. Snowden testified that in his opinion the possession of 850 packets of heroin and approximately $1500 in cash was indicative of intent to distribute rather than personal use.

The jury found Potter guilty on all counts. He was sentenced on July 19. The State moved for a mandatory extended term, pursuant to *N.J.S.A.* 2C:43–6(f), based on Potter's previous conviction for possession of CDS with the intent to distribute. The trial judge granted the motion.

In sentencing Potter, the judge found three aggravating factors and no mitigating factors. He imposed a sentence of fifteen years in prison with seven-and-one-half years of parole ineligibility pursuant to *N.J.S.A.* 2C:43–6(f). He explained his reasons for the sentence as follows:

> On the aggravating factors, the risk [Potter] will commit another offense, the extent of his prior record and the need to deter [Potter] and others from violating the law. There are no mitigating factors. [Potter] has seven prior municipal court convictions. He [has] been convicted in Superior Court nine times. He's a habitual criminal. He's somebody who for whatever reason is bent on spending the bulk of his life behind bars. That's his decision.
>
> With reference to the sentence in this matter, the State contends and has indicated to the [c]ourt that [Potter] should be sentenced on the second count of the indictment and the other counts merge with it. I therefore will go along

with that recommendation. I have, however, decided that this is an extended term and there is clearly a situation where a stipulated period of parole ineligibility would apply. As I have indicated, [Potter] is a career criminal. Not to the extent that he's involved in organized crime, but he's involved in illegal activity constantly.

On the second count, I merge the other two counts into this[;] he's sentenced to 15 years [in a] New Jersey State Prison. There's seven and a half years of parole ineligibility.

This appeal followed.

II.

Potter raises the following appellate arguments through counsel:

***5** *POINT I:* THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S ERRONEOUS INSTRUCTION ON THE LAW PERTAINING TO THE QUANTITY REQUIREMENT FOR A SECOND [-]DEGREE INTENT TO DISTRIBUTE CDS CRIME. (Not Raised Below)

POINT II: THE DEFENDANT'S RIGHT TO CONFRONTATION, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION, AND THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WERE VIOLATED BY THE ADMISSION OF ACCUSATIONS FROM ABSENTEE WITNESSES ABOUT PRIOR CRIMES ALLEGEDLY COMMITTED BY THE DEFENDANT. (Not Raised Below)

A. THE POLICE IMPROPERLY INFORMED JURORS THAT THE DEFENDANT WAS UNDER SURVEILLANCE FOR NARCOTICS OFFENSES.

B. THE FACT THAT THE POLICE HAD THE DEFENDANT UNDER SURVEILLANCE FOR NARCOTICS OFFENSES HAD NO PROBATIVE VALUE AND WAS UNDULY PREJUDICIAL.

C. THE STATE IMPROPERLY ELICITED OTHER–CRIME EVIDENCE THAT THE DEFENDANT HAD BEEN SELLING DRUGS ON PRIOR OCCASIONS.

D. THE TRIAL COURT FAILED TO GIVE A PROPER LIMITING INSTRUCTION.

POINT III: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY PROSECUTORIAL MISCONDUCT. (Not Raised Below)

POINT IV: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE IMPROPER ADMISSION OF THE STATE'S EXPERT WITNESS' TESTIMONY CONCERNING MATTERS WELL WITHIN THE KEN OF THE AVERAGE JUROR. (Not Raised Below)

POINT V: THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 10 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE DEFECTIVE WAIVER PROCEDURE.

POINT VI: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT EXPRESSLY DISAVOWED ITS OBLIGATION TO ENSURE A FAIR TRIAL, RESULTING IN UNFAIR PREJUDICE. (Not Raised Below)

POINT VII: THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 1 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED WHEN THE STATE'S LAY WITNESS RENDERED

HIGHLY PREJUDICIAL OPINIONS THAT SHOULD HAVE BEEN EXCLUDED. (Not Raised Below)

POINT VIII: THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT WAS VIOLATED, AND THE TRIAL COURT ERRONEOUSLY DENIED THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON THOSE GROUNDS.

***6** *POINT IX:* THE DEFENDANT'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AS GUARANTEED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ART. I, PAR. 7 OF THE NEW JERSEY CONSTITUTION WAS VIOLATED BY THE UNLAWFUL DETENTION AND SEARCH OF THE DEFENDANT.

A. THE DEFENDANT WAS UNLAWFULLY DETAINED.

B. THE POLICE LACKED PROBABLE CAUSE TO SEARCH THE DEFENDANT.

POINT X: THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT'S WAIVER OF MIRANDA RIGHTS HAD BEEN MADE KNOWINGLY AND VOLUNTARILY.

POINT XI: THE SENTENCE IS EXCESSIVE.

A. THE TRIAL COURT IMPROPERLY BALANCED THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

B. THE COURT MADE FINDINGS OF FACT TO ENHANCE THE SENTENCE.

Potter filed a pro se supplemental brief in which he argued the following points:

POINT I: THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT[']S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947.

POINT II: THE INSTRUCTIONS BY THE TRIAL JUDGE TO THE JURY EXCEEDED THE BOUNDS OF FAIR COMMENT AND CONSTITUTED PREJUDICIAL ERROR AND DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947.

POINT III: THE DEFENDANT[']S RIGHT TO CONFRONTATION AS [GUARANTEED] BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION OF 1947, AND THE DEFENDANT[']S RIGHT TO DUE PROCESS THAT IS [GUARANTEED] BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE TRIAL COURT DENIED THE DEFENDANT[']S MOTION TO OBTAIN THE POLICE RECORDS OF THE STATE[']S WITNESSES.

A.

We begin our discussion of the issues with Potter's argument that the motion judge erred by granting his motion for leave to represent himself.

By way of background, we note that this trial was not the first in which Potter sought to represent himself. He represented himself during a trial held in January 2005, and was convicted. *State v. Potter,* A–4213–04 (App. Div. June 25, 2007) (slip op. at 5–8), *certif. denied,* 192 *N.J.* 482 (2007). He appealed, arguing, as he does here, that the trial judge should not have allowed him to represent himself. *Id.* at 8. We found no merit in that argument, and affirmed the conviction. *Id.* at 3, 8. Potter was then denied the opportunity to represent himself during a trial held in June 2005, and was convicted. *State v. Potter,* A–1291–05 (App.Div. July 31, 2007) (slip op at 1–3), *certif. denied,* 193 *N.J.* 586 (2008). He appealed, arguing in part that he should have been allowed to represent himself. *Id.* at 2. We reversed on that basis. According to Potter, the case was not retried.

We review the judge's determination that Potter's waiver of his right to counsel was knowing and intelligent under an abuse of discretion standard. *See State v. DuBois,* 189 *N.J.* 454, 475 (2007). A "[d]efendant possesses both the right to counsel and the right to proceed to trial without counsel." *Id.* at 465. In *State v. Crisafi,* 128 *N.J.* 499, 509 (1992), the Court explained that a defendant may "exercise the right to self-representation

only by first knowingly and intelligently waiving the right to counsel." In *State v. DuBois, supra,* 189 *N.J.* at 467 (citing *Crisafi, supra,* 128 *N.J.* at 311–12), the Court also directed:

> ***7** [W]hen determining whether a waiver of counsel is knowing and intelligent, trial courts must inform defendant of: (1) the nature of the charges, statutory defenses, and possible range of punishment; (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful; (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence; (4) the fact that lack of knowledge of the law may impair defendant's ability to defend himself; (5) the impact that the dual role of counsel and defendant may have; and (6) the reality that it would be unwise not to accept the assistance of counsel.

The Court set forth additional requirements to the process, specifically that

> (1) the discussions should be open-ended for defendants to express their understanding in their own words; (2) defendants should be informed that if they proceed pro se, they will be unable to claim they provided ineffective assistance of counsel; and (3) defendants should be advised of the effect that self-representation may have on the right to remain silent and the privilege against self-incrimination.
>
> [*Id.* at 468 (citing *State v. Reddish,* 181 *N.J.* 553, 594–95 (2004)).]

In analyzing a defendant's responses to these concerns, the court should " 'indulge [in] every reasonable presumption against waiver.' " *State v. King,* 210 *N.J.* 2, 19 (2012) (alteration in original) (quoting *State v. Gallagher,* 274 *N.J.Super.* 285, 295 (App.Div.1994)). "Only in the rare case can the record support a finding that, in the absence of such a searching examination, a defendant did indeed 'fully appreciate[ ] the risks of proceeding without counsel, and ... decide[ ] to proceed pro se with his eyes open.' " *Id.* at 20 (alterations in original) (quoting *Crisafi, supra,* 128 *N.J.* at 513). The "ultimate focus" of this inquiry is on the defendant's "actual understanding of the waiver of counsel." *Crisafi, supra,* 128 *N.J.* at 512.

Having reviewed the transcript of Potter's questioning by the motion judge concerning his request to represent himself, we find that the record reflects full compliance with the requirements of *Reddish* and *DuBois.* Although the judge might have explained that Potter's response to her question about hearsay was incorrect, her failure to do so does not warrant reversal. She clearly expressed her concern that "there are a lot of technical issues that can come up that an attorney may be able to use to your benefit that you may not be aware of." Potter was adamant that he wanted to represent himself, as he had been in the past. Potter identified the risk that he would be found guilty as a risk of self-representation. When the judge asked him if he thought that "if [he] was represented by an attorney, that risk might have been lowered based upon the attorney's knowledge of the law," Potter responded: "No." The judge was not obligated to provide instruction concerning the law of hearsay.

B.

***8** We next turn to the pretrial suppression issues concerning the evidence seized when Potter was arrested and the statement taken after he was brought to police headquarters.

The Supreme Court has explained the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress as follows:

> [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [*State v. Elders,* 386 *N.J.Super.* 208, 228 (App.Div.2006)] (citing *State v. Locurto,* 157 *N.J.* 463, 474 (1999)); *see also State v. Slockbower,* 79 *N.J.* 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the ... investigatory search [was] not based on probable cause"); *State v.. Alvarez,* 238 *N.J.Super.* 560, 562–64 (App.Div.1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present

in the record" (citing *State v. Johnson,* 42 *N.J.* 146, 164 (1964))).

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Johnson, supra,* 42 *N.J.* at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. *Id.* at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *Ibid.*

[*State v. Elders,* 192 *N.J.* 224, 243–44 (2007) (third alteration in original).]

Our review of the motion judge's legal conclusions is plenary. *State v. Harris,* 181 *N.J.* 391, 420–21 (2004), *cert. denied,* 545 U.S. 1145, 125 S.Ct. 2973, 162 *L. Ed.*2d 898 (2005); *State v. Goodman,* 415 *N.J.Super.* 210, 225 (App.Div.2010), *certif. denied,* 205 *N.J.* 78 (2011).

i.

We start with the search and seizure issue. Under the Fourth Amendment of the United States Constitution and article I, paragraph 7 of the New Jersey Constitution, "[a] warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Cooke,* 163 *N .J.* 657, 664 (2000) (citing *State v. Alston,* 88 *N.J.* 211, 230 (1981)). The same is true of the warrantless seizure of a person or property. *Terry v. Ohio,* 392 *U.S.* 1, 19–21, 88 *S.Ct.* 1868, 1879–80, 20 *L. Ed.*2d 889, 905–06 (1968) (seizure of a person); *State v. Hempele,* 120 *N.J.* 182, 218–19 (1990) (seizure of property).

***9** The seizure of a person occurs in a police encounter if the facts objectively indicate that "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *State v. Tucker,* 136 *N.J.* 158, 166 (1994) (quoting *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 *L. Ed.*2d 389, 402 (1991)) (internal quotation marks omitted). In applying that test, our courts implement the constitutional guarantee to protect the "reasonable expectations of citizens to be 'secure in their persons, houses, papers and effects.' " *Id.* at 165 (quoting *N.J. Const.* art. I, ¶ 7).

The Supreme Court has defined a field inquiry as "the least intrusive" form of police encounter, occurring when a "police officer approaches a person and asks 'if [the person] is willing to answer some questions.' " *State v. Pineiro,* 181 *N.J.* 13, 20 (2004) (alteration in original) (quoting *State v. Nishina,* 175 *N.J.* 502, 510 (2003)). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.' " *Ibid.* (alteration in original) (quoting *Nishina, supra,* 175 *N.J.* at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.' " *State v. Privott,* 203 *N.J.* 16, 24 (2010) (quoting *State v. Maryland,* 167 *N.J.* 471, 483 (2001)).

In contrast to a field inquiry, an investigatory stop, also known as a *Terry* stop, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. *State v. Stovall,* 170 *N.J.* 346, 355–56 (2002); *see also Terry, supra,* 392 U.S. at 19, 88 S.Ct. at 1878–79, 20 *L. Ed.*2d at 904.

The *Terry* exception to the warrant requirement permits a police officer to detain an individual for a brief period, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *State v. Rodriguez,* 172 *N.J.* 117, 126 (2002) (quoting *Terry, supra,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 *L. Ed.*2d at 906). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." *State v. Davis,* 104 *N.J.* 490, 504 (1986). There is no mathematical formula for deciding whether the totality of circumstances provides the required articulable or particularized suspicion and, [a]s the case law suggests, the test is qualitative, not quantitative. *Stovall, supra,* 170 *N.J.* at 370.

***10** Our review of the record convinces us that the motion judge did not err when she denied the motion to suppress. The testimony was that the two officers approached Potter

and stopped on either side of him. As Warraich asked for his name and what he was doing at the time, he observed what he believed to be drugs in plain view. We consider that interaction to have been a simple field inquiry, rather than an investigatory stop. There was nothing "harassing, overbearing, or accusatory in nature," *Pineiro, supra,* 181 *N.J.* at 20 (quoting *Nishina, supra,* 175 *N.J.* at 510), with respect to the actions of the police. As Raisin testified, the arrest took place "30 seconds" after Camilleri and Warraich approached Potter.

Even if the interaction is viewed as an investigatory stop, we find that there were sufficient facts known to and observed by the officers for them to have had "a reasonable suspicion of criminal activity," *Rodriguez, supra,* 172 *N.J.* at 126. Raisin had been told by a reliable informant that Potter regularly walked a specific route, from Vita Garden Apartments, through a specific basketball court, to play cards and sell heroin at a specific building on Bangs Avenue. Raisin testified that he was told by the informant that Potter carried drugs with him when he went to Bangs Avenue, and the judge credited that testimony. During the surveillance on April 27, 2010, the police officers observed Potter traveling that route, as predicted by the informant. Information provided to the police by a reliable informant may generate the reasonable suspicion necessary for an investigatory stop. *Davis, supra,* 104 *N.J.* at 505–06.

Once the bags containing the drugs were seen in plain view, there was probable cause for the arrest. Searches incident to a lawful arrest are a well-established exception to the warrant requirement. *State v. Pena–Flores,* 198 *N.J.* 6, 19 (2009).

ii.

We now turn to the *Miranda* issue. A trial judge will admit a confession into evidence only if the State has proven beyond a reasonable doubt, based on the totality of the circumstances, that the suspect's waiver of those rights was knowing, intelligent, and voluntary. *State v. Patton,* 362 *N.J.Super.* 16, 42 (App.Div .), *certif. denied,* 178 *N.J.* 35 (2003). In reviewing a trial judge's ruling on a *Miranda* motion, we analyze police-obtained statements using a "searching and critical" standard of review to ensure that constitutional rights have not been trampled upon. *Patton, supra,* 362 *N.J.Super.* at 43 (citations and internal quotation marks omitted). We generally will not "engage in an independent assessment of the evidence as if [we] were the court of first instance," *State v. Locurto,* 157 *N.J.* 463, 471 (1999), nor will we make conclusions regarding witness credibility, *State v. Barone,* 147 *N.J.* 599, 615 (1997). Instead, we generally defer to the trial judge's credibility findings. *State v. Cerefice,* 335 *N.J.Super.* 374, 383 (App.Div.2000).

***11** A suspect's confession during a custodial interrogation can only be obtained if that suspect was supplied with his or her *Miranda* rights. *Miranda, supra,* 384 U.S. at 461, 86 S.Ct. at 1620–21, 16 *L. Ed.*2d at 716. Before considering the validity of a waiver of *Miranda* rights, it must be established that the police scrupulously honored the suspect's right to remain silent. *State v. Burno–Taylor,* 400 *N.J.Super.* 581, 589 (App.Div.2008). If the suspect's words or conduct, upon being advised of his or her rights, "could not reasonably be viewed as invoking the right to remain silent," this requirement is satisfied and the police may continue their questioning. *Id.* at 590 (citing *State v. Bey,* 112 *N.J.* 123, 136–38 (1988)).

The trial judge determined, by the required standard, that the State had demonstrated that Potter had freely and voluntarily waived his *Miranda* rights after they had been appropriately explained to him. He rejected Potter's assertions that he was promised lenient treatment if he identified the person who had supplied him with the heroin, noting that there was no evidence of such a promise and that he had not, in fact, identified his supplier. He further found that there was no evidence that Potter was suffering from heroin withdrawal when the waiver took place, and that, even if Potter was not aware that the statement was being videotaped, there was no obligation to so inform him, citing *State v. Vandever,* 314 *N.J.Super.* 124, 127–28 (App.Div.1998). Those findings and conclusions are fully supported by the record, the trial judge's findings of fact, and the applicable law.

On appeal, Potter argues for the first time that he was denied the opportunity to seek the advice of counsel over the telephone. There is no evidence in the record to support that claim. The fact that Samis told Potter at the end of the interview that he could make telephone calls once they found out what his bail was does not support Potter's claim.

C.

We now turn to the issues raised with respect to the sentence. Potter alleges that it was excessive and illegal because it was based on impermissible judicial factfinding.

"[Our] review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." *State v. Blackmon,* 202 *N.J.* 283, 297 (2010) (citing *State v. Jarbath,* 114 *N.J.* 394, 401 (1989)). "In conducting the review of any sentence, appellate courts always consider whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether 'the factfinder [has] appl[ied] correct legal principles in exercising its discretion.' " *Ibid.* (alterations in original) (quoting *State v. Roth,* 95 *N.J.* 334, 363 (1984)). The traditional articulation of this standard limits a reviewing court's scope of review to situations in which the application of the facts to law has resulted in a clear error of judgment and to sentences that "shock the judicial conscience." *Roth, supra,* 95 *N.J.* at 363–65. If the sentencing court has not demonstrated a clear error of judgment or the sentence does not shock the judicial conscience, appellate courts are not permitted to substitute their judgment for that of the trial judge. *Id.* at 364–65.

***12** "In exercising its authority to impose [a] sentence, the trial court must identify and weigh all of the relevant aggravating factors that bear upon the appropriate sentence as well as those mitigating factors that are 'fully supported by the evidence.' " *Blackmon, supra,* 202 *N.J.* at 296–97 (quoting *State v. Dalziel,* 182 *N.J.* 494, 504–05 (2005)).

N.J.S.A. 2C:43–6(f) requires, on motion by the prosecutor, an extended term for a person previously convicted of a crime involving the distribution or intended distribution of narcotics, if that person is convicted a second time of such an offense. Potter had the requisite prior drug conviction, and in fact had more than one. We see no error in the judge's selection and weighing of the sentencing factors, nor was there double counting with respect to prior convictions. That Potter will not be eligible for release until he is in his sixties is not a mitigating factor. Potter's cooperation with the police was minimal at best. He did not name his source, and did not plead guilty. The sentence was legal and not excessive.

With respect to judicial factfinding, Potter's reliance on *Alleyne v. United States,* —— *U.S.* ——, 133 *S.Ct.* 2151, 186 *L. Ed.*2d 314 (2013) is misplaced. In *Alleyne,* the Court recognized and differentiated the traditional role of a sentencing judge in applying sentencing factors.

> Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. *See, e.g., Dillon v. United States,* 560 *U.S.* 817, ——, 130 *S.Ct.* 2683, 2692, 177 *L. Ed.*2d 271 (2010) ("[W]ithin established limits [,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts" (emphasis deleted and internal quotation marks omitted)); *Apprendi [v. New Jersey],* 530 *U.S.* [466,] 481, 120 *S.Ct.* 2348, [2358,] 147 *L. Ed.*2d 435[, 449 (2000)] ("[N]othing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute").
>
> [*Id.* at ——, 133 *S.Ct.* at 2163, 186 *L. Ed.*2d at 330 (first, second, third, and eighth alterations in original).]

Our Supreme Court eliminated presumptive sentencing specifically to avoid the situation in which judicial factfinding is used to enhance a sentence. *State v. Natale,* 184 *N.J.* 458, 488 (2005).

D.

Having reviewed Potter's remaining arguments in light of the facts in the record and the applicable law, we find them to be without merit and not warranting an extended discussion in a written opinion. *R.* 2:11–3(e)(2). We add only the following with respect to some of those arguments. Others do not require any discussion.

***13** However, we note first that many of the arguments at issue were not raised in the trial court, and are consequently reviewed under the plain error rule. *See State v. Jenkins,* 178 *N.J.* 347, 360 (2004). Plain error is error that is "clearly capable of producing an unjust result," which should "in the interests of justice" be noticed even if "not brought to the attention of the trial ... court." *R.* 2:10–2; *see also Jenkins, supra,* 178 *N.J.* at 360–61. "[T]he possibility of injustice [must be] 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.' " *State v. Taffaro,* 195 *N.J.* 442, 454 (2008) (quoting *State v. Macon,* 57 *N.J.* 325, 336 (1971)). Plain error in the context of a jury charge is " '[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.' " *State v. Adams,* 194 *N.J.* 186, 207 (2008) (quoting *State v. Jordan,* 147 *N.J* . 409, 422 (1997)).

i.

Potter argues for the first time on appeal that the trial judge erred in failing to charge the jury that it should consider how much of the heroin he intended to keep for his personal use in determining whether he possessed "a quantity of one-half ounce or more with the intent to distribute," as required by *N.J.S.A.* 2C:35–5(b)(2). Not only did Potter fail to request such a charge, there was no evidence in the record to suggest that he intended to keep any for himself. In fact, in his statement, Potter said that he had two bags of heroin and intended to sell both of them. Consequently, there was no error and, even if there was, the error did not possess " 'a clear capacity to bring about an unjust result,' " *Adams, supra,* 194 *N.J.* at 207 (quoting *Jordan, supra,* 147 *N.J.* at 422).

ii.

Potter also argues for the first time on appeal that the State improperly introduced, through testimony that Potter was under surveillance at the time of his arrest, evidence of other crimes in violation of *N.J.R.E.* 404(b) and *State v. Cofield,* 127 *N.J* . 328, 338 (1992). Samis testified on direct that there was a surveillance set up on Potter. There was no objection. On cross-examination, when Potter asked Samis why he was under surveillance, Samis responded that they had received information from a confidential informant. Potter did not object to that testimony either, and in fact it was his cross-examination of Samis that invited the mention of the informant. In addition, he never requested a limiting instruction. Although we question whether mention of the surveillance, or the informant, in response to Potter's own question, actually raises an issue under *Cofield,* we are convinced that the testimony at issue does not raise " 'a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached,' " *Taffaro, supra,* 195 *N.J.* at 454 (quoting *Macon, supra,* 57 *N.J.* at 336).

iii.

***14** Potter contends for the first time on appeal that the prosecutor improperly stated in closing argument that Potter was engaged in an ongoing criminal enterprise. The prosecutor argued to the jury that "you can basically see a business model for this defendant." In the absence of an objection, [such] remarks usually will not be deemed prejudicial. *State v. Ramseur,* 106 *N.J.* 123, 322–23 (1987). The failure to object suggests that the defendant did not believe the remarks were prejudicial at the time they were made and deprives the court of an opportunity to take curative action. *State v. Bauman,* 298 *N.J.Super.* 176, 207 (App.Div.), *certif. denied,* 150 *N.J.* 25 (1997). In any event, the prosecutor's argument was a fair comment on that portion of Potter's statement to the police in which he said that he obtained drugs from a supplier and sold the drugs for profit. He also told them that he used the money derived from the transactions to support himself.

iv.

Potter also asserts for the first time on appeal that expert testimony in this case was improper because the expert opined that the heroin was possessed with the intent to distribute. Such testimony is specifically permitted by the Supreme Court, which held in *State v. Sowell,* 213 *N.J.* 89, 103–05 (2013) that ordinary jurors cannot be expected "to understand the difference between drugs possessed for distribution as opposed to personal use." In any event, Potter admitted in his statement to the police that he had the heroin with him because he intended to sell it.

We also find no reason to reverse on the basis of Warraich's testimony to his belief that the plastic bag in Potter's pocket contained heroin, testimony to which there was no objection. Although Warraich had not been qualified as an expert, his testimony was not offered to prove that the bags contained heroin, but rather offered to show why he arrested Potter. The State called a qualified expert to testify to her analysis of a portion of the contents of the bags seized from Potter, which established that there was more than one half of an ounce of heroin. The testimony at issue does not raise " 'a reasonable doubt as to whether [any] error led the jury to a result it otherwise might not have reached,' " *Taffaro, supra,* 195 *N.J.* at 454 (quoting *Macon, supra,* 57 *N.J.* at 336).

v.

Potter argues that he should have been allowed access to the personnel records of the police officers and detectives who conducted the surveillance. He bases his claim on information given to him by an inmate with whom he spoke while awaiting trial in the Monmouth County Correctional Facility.[5] The

allegations had no bearing on the case against Potter and were not factually supported at the time of the motion.

Although a defendant may attack a prosecution witness's credibility by revealing possible biases, prejudices, or ulterior motives as they relate to the issues in the case, *State v. Harris,* 316 *N.J.Super.* 384, 397 (App.Div.1998), the question of whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records against a defendant's right of confrontation. *Id.* at 397–98. To obtain such records, a defendant must advance 'some factual predicate which would make it reasonably likely' that the records contain some relevant information, and establish that the defendant is not merely engaging in a fishing expedition. *Id.* at 398 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 139 (Law Div.1980)). The motion judge correctly concluded that Potter failed to meet his burden and properly denied his request.

vi.

***15** Potter argues that the indictment should have been dismissed because it was based on hearsay evidence, the indictment number was incorrectly transcribed, and he was improperly denied his right to review the grand jury selection process. The motion judge correctly rejected those contentions.

A grand jury indictment is presumed valid and should only be disturbed if manifestly deficient or palpably defective, *Ramseur, supra,* 106 *N.J.* at 232, based on the 'clearest and plainest ground,' *State v. Perry,* 124 *N.J.* 128, 168 (1991) (quoting *State v. N.J. Trade Waste Ass'n,* 96 *N.J.* 8, 18–19 (1984)).[A]n indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error. *State v. Hogan,* 336 *N.J.Super.* 319, 344 (App.Div.), *certif. denied,* 167 *N.J.* 635 (2001). A discrepancy in a date stamp or other similar clerical error will not invalidate an indictment. *State v. Unsworth,* 85 *N.J.L.* 237, 238 (E.A.1913). As we explained in *State v. Holsten,* '[a]n indictment may be based largely or wholly on hearsay and other evidence which may not be legally competent or admissible at the plenary trial.' 223 *N.J.Super.* 578, 585 (App.Div.1988) (alteration in original) (quoting *State v. Schmidt,* 213 *N.J.Super.* 576, 584 (App.Div.1986), *rev'd on other grounds,* 110 *N.J.* 258 (1988)); *see also State v. McCrary,* 97 *N.J.* 132, 146 (1984) (stating that hearsay and other informal proofs are permissible in determining issues that implicate important rights, such as the bases for an indictment (citing *Costello v. United States,* 350 *U.S.* 359, 363, 76 *S.Ct.* 406, 408, 100 *L. Ed.* 397, 402–03, *reh'g denied,* 351 *U.S.* 904, 76 *S.Ct.* 692, 100 *L. Ed.* 1440 (1956))); *State v. Vasky,* 218 *N.J.Super.* 487, 491 (App.Div.1987) (A grand jury may return an indictment based largely or wholly on hearsay testimony.). Where there is sufficient evidence to sustain the grand jury's charges, the indictment should not be dismissed. *See Holsten, supra,* 223 *N .J.Super.* at 585–86.

III.

For all of the reasons stated above, we affirm the conviction and sentence on appeal.

Affirmed.

All Citations

Not Reported in A.3d, 2015 WL 3843309

Footnotes

1 The basketball courts are within 1000 feet of the Asbury Park Middle School.

2 Warraich testified that heroin is usually packaged in glassine paper, which is similar to wax paper, and marked with a stamp. They could be kept individually or in a bundle, consisting of ten bags, or in a brick, consisting of fifty bags. In a bundle, the ten bags are usually held together by a rubber band. A brick consists of five bundles wrapped in newspaper or magazine paper and shaped in a rectangle. A brick is the shape of a masonry brick, but much smaller, about three to four inches long and a little less wide.

3 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

4 Prior to the start of testimony, the judge considered and granted Potter's application to redact portions of the interview video and the related transcript.

5 Potter improperly submits documents that were not before the motion judge when she considered his request for the records. We decline to consider those documents because they are not properly before us. *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N.J.* 436, 452 (2007) (citing *R.* 2:5–5(b) and *R.* 2:9–1(a)).

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Terrel F. GOLDSMITH, a/k/a Goldsmith Fuquan, Terrell Goldsmith, Fuquan Hardwick, Shareef Hatten, Terrell Hatten, Raheem Jones, Fuquan Smith, Barry Bell, Raheem Floyd, Ron Frence, Jamar Lewis, Safee Mitchell, Tyrone Parks, and June Wells, Defendant–Appellant.

A-2496-11T1
|
Submitted Sept. 11, 2013.
|
Decided Oct. 7, 2013.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 09–09–2470.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (Jack L. Weinberg, Designated Counsel, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for respondent (Brian Pollock, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Before Judges GRALL, WAUGH, and NUGENT.

Opinion

PER CURIAM.

***1** Defendant Terrel F. Goldsmith appeals his conviction for third-degree possession of a controlled dangerous substance (CDS), *N.J.S.A.* 2C:35–10(a)(1), and third-degree possession with intent to distribute CDS, *N.J.S.A.* 2C:35–5(a)(1), as well as the resulting sentence of incarceration for seven years with a three-and-a-half-year period of parole ineligibility. We reverse.

I.

We discern the following facts and procedural history from the record on appeal.

Newark Police Detectives Henry Suarez and Philip Turzani, both assigned to the narcotics unit, testified that they were dispatched to the area of South 16th Street in response to citizen complaints about drug dealing in the area on July 1, 2009. The detectives were dressed in plain clothes and were driving an unmarked police car. They arrived at the area around 12:45 a.m.

The detectives observed a green Audi parked on South 16th Street. They were approximately seventy feet from the Audi. Suarez testified at the suppression hearing that they had an unobstructed view, and that the street was illuminated by the streetlights and adjacent house lights.

According to the detectives, a black male was in the driver's seat and a female was in the front passenger's seat. Both detectives identified Goldsmith as the driver of the Audi and co-defendant Latoya Paige as the passenger.

The detectives testified that they observed Goldsmith waving at people to come over to his car. A black male, dressed in dark clothing, approached Goldsmith and engaged in a brief conversation, after which Goldsmith reached into the vehicle, retrieved something, and handed it to the man. The unknown male then walked past the officers in their unmarked police vehicle. They observed a second black male approach the passenger side of the Audi. At the suppression hearing, Suarez testified the second black male was wearing a white shirt and blue jeans. He engaged in a similarly brief conversation with Paige, obtained something from Paige in return for some paper currency, and left the area.

As the detectives started to exit their vehicle to approach the Audi, Goldsmith pulled away from his parking spot and drove in a southerly direction. Suarez made a U-turn, followed the Audi, and stopped Goldsmith several blocks later. As Suarez pulled alongside the Audi, Turzani displayed his badge and directed Goldsmith to park the Audi. Goldsmith complied.

Suarez approached the vehicle on the driver's side with his flashlight in hand, while Turzani approached the vehicle on the passenger's side. Suarez asked for Goldsmith's license,

registration, and insurance card. According to Suarez, as Goldsmith reached for his documents in his back pocket, he observed the handle of a gun in Goldsmith's waistband. Suarez testified that he notified Turzani of the presence of the weapon using police code. He then ordered Goldsmith to show his hands by putting them out the window.

Suarez directed Goldsmith to step out of the vehicle, after which he handcuffed him and, according to Suarez, retrieved the gun from his waistband. Turzani ordered Paige out of the vehicle and placed her under arrest. Turzani estimated that the arrests occurred approximately fifteen minutes after he and Suarez observed the two transactions described above.

***2** According to Turzani, he observed a napkin containing white material, which he believed to be cocaine, in the middle of the car's console. Both detectives testified that they observed seventy baggies of cocaine in the car.

In September, Goldsmith and Paige were indicted for the following offenses: second-degree conspiracy to commit the crime of possession of CDS, *N.J.S.A.* 2C:5–2 (count one); third-degree possession of CDS, *N.J.S.A.* 2C:35–10(a)(1) (count two); third-degree possession of CDS with the intent to distribute, *N.J.S.A.* 2C:35–5(a)(1), b(3) (count three); third-degree possession of CDS with the intent to distribute within a school zone, *N.J.S.A.* 2C:35–7 (count four); and second-degree possession of CDS with the intent to distribute within 500 feet of a public housing, contrary to *N.J.S.A.* 2C:35–7.1 (count five).

The indictment also charged Goldsmith with second-degree unlawful possession of a handgun without a permit to carry, *N.J.S.A.* 2C:39–5(b) (count six); third-degree receiving stolen property, a Glock 21 semi-automatic handgun, *N.J.S.A.* 2C:20–7 (count seven); second-degree possession of a weapon while committing a violation of *N.J.S.A.* 2C:35–5 and 2C:35–7, *N.J.S.A.* 2C:39–4.1 (count eight); fourth-degree unlawful possession of hollow point bullets, *N.J.S.A.* 2C:39–3(f) (count nine); and fourth-degree possession of a large capacity ammunition magazine, *N.J.S.A.* 2C:39–3(j) (count ten).

Goldsmith filed a motion to suppress the evidence. On July 22, 2010, the motion judge held an evidentiary hearing and denied Goldsmith's motion. In January 2011, a different judge heard and denied Goldsmith's motion for discovery concerning Turzani's personnel file.

Goldsmith's first jury trial took place later in January. The trial judge held a *Sands/Brunson* [1] hearing and barred use of Goldsmith's 1997 conviction for resisting arrest as too remote for impeachment purposes. However, the judge found that his 1999 conviction for possession of CDS with the intent to distribute within 1000 feet of a school could be used for impeachment purposes, provided it was "sanitized."

On January 25, the jury found Goldsmith not guilty of counts one (second-degree conspiracy to possess), four (third-degree possession of CDS with intent to distribute in a school zone), five (second-degree possession of CDS with intent to distribute near public housing), and nine (fourth-degree unlawful possession of hollow point bullets). The jury was unable to reach a verdict on the remaining charges. On the State's motion, the judge dismissed count seven (third-degree receiving stolen property) and ten (fourth-degree possession of a large capacity ammunition magazine).

Goldsmith was retried on counts two, three, six, and eight, during August and September of 2011. Both detectives testified at trial that they had witnessed an illegal hand-to-hand transaction. Turzani also testified that thirty-one dollars was confiscated from Goldsmith. The detectives explained that the denominations of money found on Goldsmith were commonly used during drug transactions. Turzani opined that bags of cocaine usually sold from two to five dollars each. Suarez opined that the cocaine bags were sold from seven to ten dollars each.

***3** Goldsmith testified on his own behalf. He explained that he was on his first date with Paige on the night of the arrest. He and Paige went to see a movie at approximately 9:15 p.m., but left early to spend time at his home. According to Goldsmith, they left his home before midnight to take Paige home.

Goldsmith testified that they were ordered to pull over by detectives in a gray car at 11th Street and Avon. Suarez initially asked for his driving credentials, after which Turzani told him and Paige to exit the car. Once they were out of the Audi, Turzani began searching it.

When Goldsmith asked why he had been stopped, he was advised not to worry about it and to comply with the officers' requests. Goldsmith testified that, after Turzani stopped searching the car, he sat on the hood of Goldsmith's car and made a telephone call. Turzani then asked Goldsmith and Paige to wait across the street with Suarez. Approximately

fifteen minutes later, a white vehicle stopped and four police officers got out. One of the officers placed him in handcuffs.

Goldsmith testified that he was taken to police headquarters, where he was told that he had been arrested on an existing arrest warrant. According to Goldsmith, he was not told he had been arrested for possession of a gun or drugs. Goldsmith testified that other police officers came to talk to him approximately thirty minutes after he arrived at police headquarters.

Goldsmith explained that the money confiscated during the arrest was from his job as a messenger. He acknowledged a prior conviction based on a guilty plea, but asserted that he was not guilty of the charges in this case.

On cross-examination, when asked the degree of his prior conviction, Goldsmith responded that it was possession of CDS. When the prosecutor asked him whether it was just a possession, he responded in the affirmative. Following a sidebar conference, the prosecutor asked Goldsmith whether he was convicted of possessing CDS. Goldsmith responded that he could no longer remember the actual charge.

Detective Douglas Marshall of the major crimes unit testified on rebuttal that he and other detectives went to police headquarters to "debrief" Goldsmith on information relating to the weapon. According to Marshall, the major crimes unit is called whenever someone is arrested with an illegal handgun.

The jury returned guilty verdicts on count two (third-degree possession of CDS) and three (third-degree possession of CDS with the intent to distribute). The jury found Goldsmith not guilty on count six (second-degree unlawful possession of a handgun without a permit) and count eight (second-degree possession of a weapon while committing a narcotics offense).

At sentencing in October, the trial judge merged count two into count three and granted the State's motion for sentencing to a mandatory extended-term sentence pursuant to *N.J.S.A.* 2C:43–6(f). He imposed a seven-year term with three-and-a-half years without parole eligibility. This appeal followed.

II.

***4** Goldsmith raises the following issues on appeal:

POINT I: THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED.

POINT II: THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR THE COURT TO CONDUCT AN IN CAMERA REVIEW OF DETECTIVE TURZANI'S PERSONNEL FILE IN ORDER TO PERMIT THE DEFENDANT TO PROPERLY IMPEACH HIS CREDIBILITY AS A WITNESS.

POINT III: THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE THE STATE INTRODUCED IMPERMISSIBLE EXPERT OPINION TESTIMONY AND IMPROPER LAY OPINION TESTIMONY WHICH INVADED THE FACT–FINDING PROVINCE OF THE JURY. THE COURT FAILED ITS GATEKEEPER ROLE IN PRECLUDING ADMISSION OF THIS IMPERMISSIBLE TESTIMONY SUA SPONTE. [Not raised below.]

POINT IV: THE STATE DEPRIVED THE DEFENDANT THE RIGHT TO A FAIR TRIAL BY COMMENTING UPON AND INTRODUCING EVIDENCE IN VIOLATION OF HIS FIFTH AMENDMET RIGHT TO REMAIN SILENT AND STATE LAW PRIVILEGE AGAINST SELF–INCRIMINATION. [Not raised below.]

POINT V: THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR WAS ALLOWED TO CROSS–EXAMINE THE DEFENDANT ABOUT THE DETAILS OF HIS PRIOR CONVICTION FOR POSSESSION WITH INTENT TO DISTRIBUTE CDS WHICH WAS THE SAME CRIME FOR WHICH HE WAS ON TRIAL IN VIOLATION OF SUPREME COURT JURISPRUDENCE ON SANITIZATION.

POINT VI: THE JURY'S GUILTY VERDICTS ON THE DRUG OFFENSES ARE BASED ON THE IMPROPERLY ADMITTED UNSANITIZED EVIDENCE. THE JURY'S ACQUITTAL ON THE WEAPONS OFFENSE WAS NOT AN EXERCISE OF LENITY. THE GUILTY VERDICTS BASED ON SUCH IMPROPERLY ADMITTED EVIDENCE CANNOT STAND. [Partially raised below.]

POINT VII: THE PROSECUTOR'S REMARKS AND ACTIONS DURING THE COURSE OF THE TRIAL CONSTITUTED PROSECUTORIAL MISCONDUCT

DEPRIVING THE DEFENDANT OF A FAIR TRIAL. [Not raised below.]

POINT VIII: THE COURT IMPOSED AN EXCESSIVE SENTENCE WHICH DID NOT TAKE INTO CONSIDERATION ALL APPROPRIATE CODE SENTENCING GUIDELINES.

A.

We begin our analysis with Goldsmith's arguments concerning pretrial rulings: (1) the denial of his motions to suppress and (2) for discovery concerning Turzani's personnel file.

i.

Goldsmith argues that the motion judge erred in denying his motion to suppress the evidence. He contends that the detectives did not have a lawful basis for the traffic stop and that the judge should not have found Suarez to be a credible witness.

The Supreme Court has explained the standard of review applicable to an appellate court's consideration of a trial judge's fact-finding on a motion to suppress as follows:

> [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." [*State v. Elders,* 386 *N.J.Super.* 208, 228 (App.Div.2006)] (citing *State v. Locurto,* 157 *N.J.* 463, 474 (1999)); *see also State v. Slockbower,* 79 *N.J.* 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the ... investigatory search [was] not based on probable cause"); *State v.. Alvarez,* 238 *N.J.Super.* 560, 562–64 (App.Div.1990) (stating that standard of review on appeal from motion to suppress is whether "the findings made by the judge could reasonably have been reached on sufficient credible evidence present in the record" (citing *State v. Johnson,* 42 *N.J.* 146, 164 (1964))).
>
> ***5** An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Johnson, supra,* 42 *N.J.* at 161. An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. *Id.* at 162. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." *Ibid.* In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions." *Ibid.*
>
> [*State v. Elders,* 192 *N.J.* 224, 243–44 (2007).] [2]

Our review of the trial judge's legal conclusions is plenary. *State v. Harris,* 181 *N.J.* 391, 420–21 (2004), *cert. denied,* 545 U.S. 1145, 125 S.Ct. 2973, 162 *L. Ed.*2d 898 (2005); *State v. Goodman,* 415 *N.J.Super.* 210, 225 (App.Div.2010), *certif. denied,* 205 *N.J.* 78 (2011).

Under the Fourth Amendment of the United States Constitution and Article 1, Paragraph 7 of the New Jersey Constitution, "[a] warrantless search is presumed invalid unless it falls within one of the recognized exceptions to the warrant requirement." *State v. Cooke,* 163 *N.J.* 657, 664 (2000) (citing *State v. Alston,* 88 *N.J.* 211, 230 (1981)). The same is true of the warrantless seizure of a person or property. *Terry v. Ohio,* 392 *U.S.* 1, 19–21, 88 *S.Ct.* 1868, 1879–80, 20 *L. Ed.*2d 889, 905–06 (1968) (seizure of a person); *State v. Hempele,* 120 *N.J.* 182, 218–19 (1990) (seizure of property).

The seizure of a person occurs in a police encounter if the facts objectively indicate that "the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." *State v. Tucker,* 136 *N.J.* 158, 166 (1994) (quoting *Florida v. Bostick,* 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 *L. Ed.*2d 389, 402 (1991)) (internal quotation marks omitted). In applying that test, our courts implement the constitutional guarantee to protect the "reasonable expectations of citizens to be 'secure in their persons, houses, papers and effects.' " *Id.* at 165 (quoting *N.J. Const.* art. I, ¶ 7).

The Supreme Court has defined a field inquiry as "the least intrusive" form of police encounter, occurring when a "police officer approaches a person and asks 'if [the person] is willing to answer some questions.' " *State v. Pineiro,* 181 *N.J.* 13,

20 (2004) (alteration in original) (quoting *State v. Nishina,* 175 *N.J.* 502, 510 (2003)). "A field inquiry is permissible so long as the questions '[are] not harassing, overbearing, or accusatory in nature.' " *Ibid.* (alteration in original) (quoting *Nishina, supra,* 175 *N.J.* at 510). During such an inquiry, "the individual approached 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.' " *State v. Privott,* 203 *N.J.* 16, 24 (2010) (quoting *State v. Maryland,* 167 *N.J.* 471, 483 (2001)).

***6** In contrast to a field inquiry, an investigatory stop, also known as a *Terry* stop, is characterized by a detention in which the person approached by a police officer would not reasonably feel free to leave, even though the encounter falls short of a formal arrest. *State v. Stovall,* 170 *N.J.* 346, 355–56 (2002); *see also Terry, supra,* 392 U.S. at 19, 88 S.Ct. at 1878–79, 20 *L. Ed.*2d at 904.

The *Terry* exception to the warrant requirement permits a police officer to detain an individual for a brief period, if that stop is "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *State v. Rodriguez,* 172 *N.J.* 117, 126 (2002) (quoting *Terry, supra,* 392 U.S. at 21, 88 S.Ct. at 1880, 20 *L. Ed.*2d at 906). Under this well-established standard, "[a]n investigatory stop is valid only if the officer has a 'particularized suspicion' based upon an objective observation that the person stopped has been [engaged] or is about to engage in criminal wrongdoing." *State v. Davis,* 104 *N.J.* 490, 504 (1986).

In denying the motion to suppress, the motion judge found that Suarez was a credible witness and that, based on his training and experience, he was qualified to conclude that he had witnessed drug transactions involving Goldsmith, Paige, and the two unknown males. The judge further found that the detectives had a sufficient basis for the stop of Goldsmith's Audi. The judge also credited Suarez's testimony that he observed the gun when Goldsmith was reaching for his driving credentials and that the drugs were found in plain view.

Goldsmith argues that the second jury's acquittal with respect to the weapons offenses suggests that it did not find Suarez credible. Whether that is accurate is not relevant to our analysis. The factfinder at the suppression hearing was the motion judge, and he did find Suarez credible. In addition, the standard of proof on a motion to suppress is preponderance of the evidence, as opposed to the standard of proof at trial —beyond a reasonable doubt. *State v. Gibson,* 429 *N.J.Super.* 456, 465 (App.Div.2013).

Giving the factual findings of the motion judge the required deference, *Elders, supra,* 192 *N.J.* at 243–44, we conclude that he did not err in denying the motion to suppress.

ii.

We next address Goldsmith's argument that the judge who decided his application for discovery concerning Turzani's personnel file abused his discretion in refusing to review the documents in camera prior to deciding the motion. We review a trial court's rulings on a defendant's discovery motion for abuse of discretion. *State v. Enright,* 416 *N.J. Super* 391, 404 (App.Div.2010), *certif. denied,* 205 *N.J.* 183 (2011).

As part of a criminal defendant's constitutional right to confrontation, a defendant may attack a prosecution witness's credibility by revealing possible biases, prejudices, or ulterior motives as they relate to the issues in the case. *State v. Harris,* 316 *N.J.Super.* 384, 397 (App.Div.1998). The question of "whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records" against a defendant's right of confrontation. *Id.* at 397–98. The State has a duty to learn of any evidence favorable to the defendant known to others acting on the government's behalf in the case, including the police. *State v. Jones,* 308 *N.J.Super.* 15, 42–43 (App.Div.1998). However, that duty cannot be triggered by mere speculation that a government file may contain exculpatory material. *Ibid.*

***7** The defendant "must advance 'some factual predicate which would make it reasonably likely' " that the records contain some relevant information, and establish that the defendant is not merely engaging in a fishing expedition. *Harris, supra,* 316 *N.J.Super.* at 398 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 139 (Law Div.1980)). Disclosure of police personnel records will be permitted where they may reveal prior bad acts that have particular relevance to the issues at trial. *Ibid.*

The motion judge determined that Goldsmith had presented an inadequate factual basis to support his request that Turzani's records be reviewed in camera. Goldsmith relied primarily on the fact that he had made a complaint against Turzani and that his attorney was aware of two others who

also made some sort of complaint, one involving the theft of funds.

In light of the minimal factual support for Goldsmith's motion, we find no basis to conclude that the judge abused his discretion in denying the motion. [3]

B.

We now turn to Goldsmith's contentions concerning errors during the second trial: (1) the opinion evidence concerning whether there was a drug transaction; (2) the cross-examination concerning his prior criminal conviction despite the pretrial ruling on sanitization of that evidence; and (3) the evidence concerning Goldsmith's interrogation by the major crimes unit.

With respect to evidential rulings, our standard of review is abuse of discretion. "Trial judges are entrusted with broad discretion in making evidence rulings." *State v. Muhammad,* 359 *N.J.Super.* 361, 388 (App.Div.), *certif. denied,* 178 *N.J.* 36 (2003). "A reviewing court should overrule a trial court's evidentiary ruling only where a clear error of judgment is established." *State v. Loftin,* 146 *N.J.* 295, 357 (1996) (citations and internal quotation marks omitted).

Some of the issues raised by Goldsmith were not raised before the trial judge. In those instances, we apply the plain error rule, which requires reversal only if the error was "clearly capable of producing an unjust result." *R.* 2:10–2. The possibility of producing an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *State v. Macon,* 57 *N.J.* 325, 336 (1971).

i.

Goldsmith argues that, even though his trial counsel did not to object to the testimony, the trial judge should have prevented the State from offering opinion evidence by Turzani and Suarez concerning the nature of what they witnessed taking place on July 1, 2009. He relies on the Supreme Court's decision in *State v. Sowell,* 213 *N.J.* 89, 99–100 (2013), in which the Court held that, "[a]s gatekeepers, trial judges must ensure that expert evidence is both needed and appropriate, even if no party objects to the testimony." The State responds that the testimony was appropriate and, in any event, did not amount to plain error.

***8** The following testimony by Turzani is at issue:

> Q. Now, officer, how long ... had you been investigating, um, street-level narcotics transactions?
>
> A. A total of ... approximately 12–and–a–half years.
>
> Q. And can you approximate for the jury how many actual drug transactions you've observed?
>
> A. Thousands. Of street-level hand-to-hand narcotic activity, thousands.
>
> Q. And how many times have you come into contact with illegal drugs?
>
> A. Numerous—thousands, thousands of cases.
>
> Q. And how many arrests at that point had you made for illegal drug transactions, illegal street-level drug transactions?
>
> A. The same, thousands[.]
>
> ....
>
> Q. —had you received training with respect to identifying the characteristics of a street-level drug transaction?
>
> A. Yes.
>
> Q. In your training and experience, what did you think you observed that day?
>
> A. I observed a narcotic ... transaction.
>
> Q. And the size of the object that was handed by Mr. Goldsmith to the unidentified individual, was that consistent with, um crack cocaine, a bag of crack cocaine?
>
> A. Yes.
>
> Q. And what you saw being handed back to Mr. Goldsmith in return, was that consistent with a bill?
>
> A. Yes.
>
> ....
>
> Q. Now, you're an experienced narcotics officer. You testified earlier that you've observed thousands of drug

transactions ... been part of almost as many arrests. Those denominations—three $5 bills and 16 singles, $1 bills ... does that have any significance .... to you as [an] experienced narcotics officer?

A. Yes, it would designate that he's selling narcotics.

Q. How? What does that mean?

A. Most ... drug addicts that walk up to people that are buying them ... they're usually $5 bags or maybe even less. Sometimes $2 to $5 they charge them....

....

Q. Um, your training and experience ... those bags are worth between $2 and $5?

A. That's what they sell it for on the street, yes.

....

Q. Were the drugs field-tested?

A. Yes, by Detective Webber.

....

Q. The field test confirms that at least one of the bags was, indeed, crack cocaine?

A. Yes.

Goldsmith also objects to the following testimony by Suarez:

Q. Now ... at this point, how long had you been a narcotics detective?

A. Four-and-a-half years.

Q. Now, how many narcotics investigations had you been a part of at this point in your career?

A. At that point, I was part of hundreds of narcotic investigations.

Q. Now, had you actually observed hand-to-hand illegal drug transactions on the street?

A. Yes, I have.

Q. Approximately how many have you observed?

A. Hundreds of transactions.

Q. Now, when you witnessed this activity at the driver's side window of the Audi, what did you think?

A. Well, I—we, myself and my partner, we definitely thought that a crime was going to be committed, something was going to happen. The driver of the vehicle was calling people over for a reason.

***9** Q. Now, what did you actually observe take place between the man—the unidentified man wearing all black walking to the driver's side of the vehicle—and the man sitting in the driver's seat of the vehicle?

A. Well, at that time, ... they engaged in[ ] a brief conversation. And then I observed the driver of the vehicle, the guy was sitting on the driver's seat, he reach[ed] for something in the middle of the vehicle, hand[ed] it to the person that was standing outside his vehicle, the person dressed all in black, hand[ed] him an object. And then this person hand[ed] some paper currency to the driver.

Q. Now, the object that you saw the driver hand the other individual, can you describe the size?

A. No, I couldn't. It was—we were too far.

....

Q. Now, with your training and experience as a narcotics detective, did you not believe you just witnessed a drug transaction, an illegal drug transaction?

A. Yes, we did.

We agree with Goldsmith that the testimony at issue should have been excluded by the trial judge, even in the absence of an objection. Both officers gave opinion testimony based on their alleged expertise in narcotics investigation without having been qualified as experts pursuant to *N.J.R.E.* 702. More importantly, they both testified, again based on their expertise, that they had witnessed Goldsmith and Paige engage in drug transactions, which was an issue to be determined by the jury. *Sowell, supra,* 213 *N.J.* at 99–102; *State v. McLean,* 205 *N.J.* 438, 460–63 (2011); *State v. Odom,* 116 *N.J.* 65, 77 (1989).

A qualified police officer can testify at trial in the form of opinion concerning issues such as whether certain quantities or packaging of narcotics is indicative of possession for personal use or for distribution. *Odom, supra,* 116 *N.J.* at 76–82. That portion of the detectives' testimony would have been

admissible had it been presented following their qualification as experts.

However, the detectives should not have been permitted to testify that they witnessed drug transactions. The jury was capable of making that determination based on the nature of (1) the conduct testified to by the detectives and (2) the drugs and currency found at the time of the arrest, about which there could have been expert testimony had the witnesses been properly qualified. *Sowell, supra,* 213 *N.J.* at 100–02.

Although the defense presented at trial was that Goldsmith was not even at the location where the purported drug transaction took place, the jury was not required to credit that part of the defense case. That being the case, the testimony of two police "experts" that the transactions they witnessed were drug purchases was "clearly capable of producing an unjust result," such that there is "a reasonable doubt" as to whether the jury would have reached the same result without the improper opinion testimony.

Consequently, the convictions must be reversed.

ii.

***10** We now turn to the issue of whether the trial judge erred in permitting the prosecutor to cross-examine Goldsmith on the nature of his prior conviction.

N.J.R.E. 609 permits the use of prior convictions for impeachment purposes "unless excluded by the judge as remote or for other causes." Goldsmith had two prior convictions. One was excluded as remote. The other, more recent conviction was for an offense similar to the distribution offense for which he was being tried. Under those circumstances, "the prosecution [is permitted to] 'introduce evidence of the defendant's prior conviction limited to the degree of the crime and the date of the offense but excluding any evidence of the specific crime of which defendant was convicted.' " *State v. Harris,* 209 *N.J.* 431, 441–42 (2012), *cert. denied,* 532 *U.S.* 1057, 121 *S.Ct.* 2204, 149 *L. Ed.*2d 1034 (2001) (quoting *Brunson, supra,* 132 *N.J* . at 391). If, however, a defendant testifies falsely about a prior conviction, further questioning concerning the nature of the conviction may be permissible. *See State v. Buffa,* 51 *N.J.Super.* 218, 227 (App.Div.1958), *aff'd,* 31 *N.J.* 378, *cert. denied,* 364 *U.S.* 916, 81 *S.Ct.* 279, 5 *L. Ed.*2d 228 (1960).

The following testimony took place during Goldsmith's cross-examination:

> Q. Now you told the jury earlier with respect to your conviction in 1999, um, ...
>
> A. Ninety-six.
>
> Q. Nineteen-ninety-six?
>
> A. I pleaded guilty in '99 though. The charge was in '96, I pleaded guilty in '99.
>
> ....
>
> Q. *It was a third-degree offense right?*
>
> A. *Possessing C.D.S.*
>
> Q. And you were sentenced to ...
>
> A. Three with a one.
>
> Q. *It was just possession of C.D.S.?*
>
> A. *Yes.*
>
> [(Emphasis added).]

The prosecutor's initial question concerning the degree of the offense was proper under *Harris* and *Brunson.* Had Goldsmith simply answered in the affirmative, the prosecutor would not have been allowed to go into the nature of the offense. However, Goldsmith's answer was not responsive to the question about the degree of his prior conviction. While the answer was accurate as far as it went, it was incomplete because the prior offense involved possession with intent to distribute and not mere possession.

Rather than insisting on an answer to the question he had asked, the degree of the prior offense, the prosecutor asked Goldsmith whether it was "just possession." The prosecutor knew that it was not, yet he invited Goldsmith to testify that it was.

It was only after Goldsmith answered in the affirmative, thereby giving an inaccurate rather than an incomplete answer, that the prosecutor asked for a conference at sidebar. He then argued that Goldsmith's second answer, the one he had invited, had "opened the door" to questions about the nature of the offense. After the trial judge learned the actual nature of Goldsmith's prior conviction, the colloquy at sidebar then continued:

***11** [DEFENSE COUNSEL:] At a minimum the jury now knows at the time he's looking. He's the one that baited defendant—

[PROSECUTOR:] I didn't bait him.

[DEFENSE COUNSEL:] —and deliberately asked him what he was arrested for....

....

[THE COURT:] He said he didn't ask him that.

[PROSECUTOR:] I said you pleaded ... to a third-degree crime.

[THE COURT:] That's exactly what he said. And then your guy popped it out of his mouth unresponsively.

[DEFENSE COUNSEL:] No problem, Judge. I'll correct it.

....

[DEFENSE COUNSEL:] [T]hat's what he recalls

[PROSECUTOR:] Well, it's a half truth.

[DEFENSE COUNSEL:] *So, you do it.* That's what he recalls.

[PROSECUTOR:] Yeah.

[DEFENSE COUNSEL:] I don't have a problem with it. Let's go.

[THE COURT:] Alright. He doesn't have a problem with it. He opened the door, you can cross-examine on it.

[(Emphasis added).]

The prosecutor then continued his cross-examination:

Q. Now, isn't it true, ... that you pled guilty to possession of CDS with intent to distribute within 1,000 feet ... of a school? Isn't that what you pled guilty to?

A. I don't remember.

Prosecutors have a duty to refrain from employing "improper methods calculated to produce a wrongful conviction." *State v. Wakefield,* 190 *N.J.* 397, 436 (2007), *cert. denied,* 552 *U .S.* 1146, 128 *S.Ct.* 1074, 169 *L. Ed.*2d 817 (2008) (quoting *Berger v. United States,* 295 U.S. 78, 88, 55 *S.Ct.* 629, 633, 79 *L. Ed.* 1314, 1321 (1935)). Thus, prosecutors must "refrain from any conduct lacking in the essentials of fair play, and where [ ] conduct has crossed the line and resulted in foul play, the reversal of the judgment below will be ordered." Wakefield, *supra,* 190 *N.J.* at 437 (quoting *State v. Siciliano,* 21 *N.J.* 249, 262 (1956)). "[T]o justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of [her] defense." *Id.* at 438 (quoting *State v. Papasavvas,* 163 *N .J.* 565, 625 (2000)).

Given the highly prejudicial nature of the prior conviction, the prosecutor should have asked for the conference before he asked the follow-up question. Instead, he asked a leading question based on a premise he knew to be inaccurate. That caused Goldsmith to turn his earlier incomplete answer into an inaccurate one, but only by agreeing to the prosecutor's erroneously premised question. In doing so, the prosecutor precluded the possibility of returning the focus of the interrogation to the degree of the offense without getting into the highly prejudicial details of the offense. The prosecutor knew that the nature of the conviction was to be sanitized, yet he did not ask for the judge's guidance until after he had set the hook with his second question. It was the prosecutor who was primarily responsible for inducing Goldsmith to "open the door" by asserting that it was "just" possession.

***12** Admittedly, defense counsel further complicated matters by telling the judge that he "would deal with it." Nevertheless, the trial judge should have precluded any further examination on the issue based on the prosecutor's role in exacerbating the problem. Had the judge limited the prosecutor to insisting on an answer to his question about the charge of the offense, the jury would not have known that the prior conviction involved distribution, and Goldsmith would have had to live with his mistake in bringing up the fact that his prior conviction was for a drug offense.

The significant likelihood of prejudice resulting from the testimony that his prior conviction was for *distribution* is illustrated by the fact that the jury convicted him of the drug offenses but acquitted him of the weapons offenses. We conclude that the disclosure of the full nature of Goldsmith's prior conviction is a second basis for reversal.

iii.

Because we remand for retrial, we briefly mention Goldsmith's argument that his Fifth Amendment right to remain silent was infringed when the State offered testimony concerning the major crimes unit's protocol on the interrogation of defendants in cases involving weapons. We find the argument to be without merit and not warranting extended discussion in a written opinion. *R.* 2:11–3(e)(2). There was no testimony that Goldsmith refused to cooperate or that he invoked his right to remain silent. We find no error, and certainly no plain error "clearly capable of producing an unjust result." *R.* 2:10–2.

C.

In light of our decision to reverse on the basis of the opinion testimony by the police officers and the introduction of the nature of Goldsmith's prior conviction, we need not reach the remaining arguments raised on appeal.

III.

Reversed and remanded.

All Citations

Not Reported in A.3d, 2013 WL 5507742

Footnotes

1 *State v. Brunson,* 132 *N.J.* 377 (1993); *State v. Sands,* 76 *N.J.* 127 (1978).

2 *State v. Diaz–Bridges,* 208 *N.J.* 544, 565–66 (2011), outlines a different standard for cases involving videos of police interrogations. Because there were no videos in this case, that standard is not applicable.

3 Our holding does not preclude Goldsmith from seeking such discovery in connection with any retrial, if an appropriate factual basis is available and presented to the trial judge.

2010 WL 3075470
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.
Marco CERRONE, Defendant-Appellant.

Submitted Nov. 4, 2009.
|
Decided Aug. 4, 2010.

West KeySummary

1 **Witnesses** Extent of Showing; Number of Offenses

Trial court did not abuse their discretion in determining the state could use three prior convictions to impeach defendant if he testified. Second-degree aggravated sexual assault was a serious offense and defendant's criminal record from that conviction forward, which included two more indictable convictions, evidenced his contempt for the bounds of behavior placed on all citizens. Additionally, defendant had an intervening municipal court conviction for disorderly conduct, which was considered in determining whether defendant's prior convictions were too remote for impeachment purposes.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 07-01-0064.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Michael Confusione, Designated Counsel, on the brief).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Joseph H. Enos, Jr., Assistant Prosecutor, on the brief).

Before Judges GILROY and SIMONELLI.

Opinion

PER CURIAM.

***1** A Gloucester County Grand Jury charged defendant with third-degree possession of a controlled dangerous substance (CDS) (cocaine), *N.J.S.A.* 2C:35-10a(1) (count one); third-degree resisting arrest, *N.J.S.A.* 2C:29-2 (count two); and fourth-degree obstruction of justice, *N.J.S.A.* 2C:29-1a.[1] On December 14, 2007, the trial court conducted an evidentiary hearing on defendant's motions to suppress evidence and to suppress statements he had given to the police after his arrest. The court denied the motions on February 8, 2008, and the matter proceeded to trial on May 7 and 8, 2008. At the close of the State's case, defendant moved for judgment of acquittal. *R.* 3:18-1. The court granted the motion as to count two only. Following the dismissal of count two, the jury found defendant guilty of count three and not guilty on count one.

On July 3, 2008, the court sentenced defendant on count three to a four-year period of probation, and to 150 hours of community service. The court also imposed all appropriate fines and penalties, and dismissed the three traffic summonses at the request of the State.

On appeal, defendant argues:

POINT I.

THE TRIAL COURT ERRED IN PRECLUDING DEFENDANT FROM ACCESSING RECORDS REGARDING THE ARRESTING OFFICER.

POINT II.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIS CAR.

POINT III.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS THE STATEMENTS HE MADE TO POLICE.

POINT IV.

THE TRIAL COURT ERRED IN RULING DEFENDANT'S PRIOR CONVICTIONS ADMISSIBLE AGAINST HIM AT TRIAL.

POINT V.

THE COMMENTS BY THE PROSECUTOR DURING SUMMATION WERE PREJUDICIAL AND DENIED DEFENDANT A FAIR TRIAL.

POINT VI.

DEFENDANT'S SENTENCE IS EXCESSIVE AND IMPROPER.

We affirm.

I.

We derive the following facts from the testimony of Patrolman Michael Shomo, the only witness who testified at trial. Early in the morning of September 17, 2007, Shomo stopped a motor vehicle operated by defendant, after observing a non-illuminated rear license plate and a large object hanging from the vehicle's rear view mirror. Shomo approached the vehicle and requested defendant to place the vehicle into park, turn off the vehicle's engine and lights, and produce his driving credentials. Although initially hesitant to follow the officer's instructions, defendant complied.

In viewing defendant's driving credentials with the assistance of his flashlight, Shomo observed what he believed was drug paraphernalia laying on the front passenger's lap and on the front floorboard, both on the passenger's and driver's side of the vehicle. Shomo instructed defendant to step out of the vehicle and not to place his hands into his pockets. Defendant stepped out of the vehicle and started walking toward its rear when he stopped, angled his body away from Shomo, and placed his right hand into his pant's pocket. Upon observing defendant's movements, Shomo instructed defendant to place his hands on his vehicle for the purpose of performing a pat down search.

***2** As Shomo started the pat down search, defendant pushed his hip against his vehicle, preventing the officer from completing the search. After defendant removed his hands from his vehicle, Shomo instructed him to place them back on the vehicle, informing him that if he removed his hands from the vehicle again, he would be arrested for obstruction of administration of justice. When defendant removed his hands from the vehicle a second time, Shomo placed him under arrest. While attempting to handcuff defendant, defendant failed to comply with the officer's instructions. Shomo and defendant slid alongside the vehicle toward its front, where defendant fell onto the driver's seat, yelling to the passenger.

Shomo removed defendant from the vehicle and attempted to search him incident to the arrest. Because defendant continued to act in an uncooperative manner, Shomo was not successful. Shomo walked defendant toward his patrol vehicle, and as they neared the patrol vehicle, defendant suddenly threw himself onto the vehicle's front hood. As Shomo continued to walk defendant toward the rear of the patrol vehicle, defendant "just let his muscles give [way]" and fell to the ground.

When Shomo attempted to help defendant off the ground, the unidentified front seat passenger exited defendant's motor vehicle. Shomo instructed the passenger to return to the vehicle. When the passenger refused, Shomo knelt on top of defendant, un-holstered his service weapon, and pointed it toward the passenger. The passenger started to get back into defendant's vehicle, but then fled the scene. Once the passenger left, Shomo assisted defendant off the ground, and placed him into the rear of the patrol vehicle.

A short time later, a second police officer arrived. The two officers attempted to remove defendant from the rear of the patrol vehicle to search him. On defendant's failure to comply with the officers' requests, Shomo sprayed defendant with a burst of Capstun and shut the vehicle's doors. When a third police officer arrived at the scene, the second police officer started a K-9 search for the passenger.

Shomo and the third officer again attempted to remove defendant from the patrol vehicle to search him. As Shomo opened the passenger door, he observed "four clear orange plastic baggies" lying on the rear floorboard of the vehicle. Although Shomo could not explain how defendant accomplished it, he testified that defendant had removed his pants and shoes. On completing the search and securing defendant in the rear of his patrol vehicle, Shomo transported defendant to police headquarters. While processing defendant, and before Shomo gave defendant his *Miranda*[2] warnings, defendant blurted out that "I go nuts around the police." Shomo asked him why, and defendant

responded, "because my old lady tried to stick it to me." Shomo acknowledged that defendant never threatened him with physical violence, but only acted in an uncooperative manner the entire time of the motor vehicle stop.

***3** We have considered the arguments raised in Points II, III, V and VI of defendant's brief, and conclude that none of those arguments are of sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). Accordingly, we turn to defendant's remaining arguments.

II.

Defendant argues in Point I of his brief that the trial court erroneously denied his pre-trial discovery request seeking police department records regarding Shomo's arrest history and incident reports where the officer may have previously filed resisting arrest or obstruction of administration of justice charges, or issued traffic summonses for violations of *N.J.S.A.* 39:3-66 or 39:3-74, against or to other third parties. Defendant contends that he sought the information to support his defense "that it was Officer Shomo who'd initiated the hostilities with defendant and then subsequently blamed defendant for the situation that developed-molding the facts against defendant to support the State's charges at trial." Defendant asserts that the court's ruling denying him access to the information, "violated his constitutional rights to impeach the State's version of events, confront the witnesses against him, and present a complete defense to the State's charges." We disagree.

On review, we accord deference to a trial court's evidentiary ruling. *State v. R.E.B.,* 385 *N.J.Super.* 72, 82, 895 A.2d 1224 (App.Div.2006). Therefore, we will not reverse a trial court's evidentiary determination "unless the court not only abused its discretion[,] but was also clearly wrong." *Ibid.* Simply stated, "an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.' " *State v. Brown,* 170 *N.J.* 138, 147, 784 A.2d 1244 (2001) (quoting *State v. Marrero,* 148 *N.J.* 469, 484, 691 A.2d 293 (1997)).

A defendant's right to confront witnesses is guaranteed by both Federal and New Jersey Constitutions. *State v. Budis,* 125 *N.J* . 519, 530, 593 A.2d 784 (1991) (citing U.S. Const. amend. VI; *N.J. Const.* art. 1, ¶ 10). "The right to cross-examine is an essential element of that right." *State v. Harvey,* 151 *N.J.* 117, 188, 699 A.2d 596 (1997), *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 *L. Ed* .2d 683 (2000). This right of confrontation affords a defendant the opportunity to question the State's witnesses, protects against improper restrictions on the questions asked during cross-examination, and affords the accused the right to elicit favorable testimony on cross-examination. *Budis, supra,* 125 *N .J.* at 530-31, 593 A.2d 784. "Cross-examination is the principal means by which a witness' credibility is tested." *State v. Harris,* 316 *N.J.Super.* 384, 397, 720 A.2d 425 (App.Div.1998). "A [witness'] credibility may be attacked by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate to issues in the case at bar." *Ibid.*

***4** Nonetheless, the right to confront witnesses "does not require disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Ibid.* A defendant is "not entitled to turn the discovery process into a fishing expedition." *State v. Broom-Smith,* 406 *N.J.Super.* 228, 239, 967 A.2d 359 (App.Div.2009), *aff'd,* 201 *N.J.* 229, 989 A.2d 840 (2010). Nor should a defendant " 'transform the discovery process into an unfocused, haphazard search for evidence.' " *State v. Gilchrist,* 381 *N.J.Super.* 138, 146, 885 A.2d 29 (App.Div.2005) (quoting *State v. D.R.H.,* 127 *N.J.* 249, 256, 604 A.2d 89 (1992)).

"The determination of whether police personnel records should be disclosed involves a balancing between the public interest in maintaining the confidentiality of police personnel records and a defendant's guarantee of cross-examination under the Confrontation Clause." *Harris, supra,* 316 *N.J.Super.* at 397-98, 720 A.2d 425. In furtherance of that balancing test, we held that where a defendant seeks to review a police officer's personnel file the defendant "must advance 'some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw .' " *Id.* at 398, 720 A.2d 425 (quoting *State v. Kaszubinski,* 177 *N.J.Super.* 136, 141, 425 A.2d 711 (Law Div.1980)). However, it's not required that the defendant first establish that the personnel file "actually contains relevant information." *Ibid.* On establishing a right to inspect the police officer's personnel file, "[t]he disclosure ... should be made to both the defense and the State in chambers and on the record." *Id.* at 387, 720 A.2d 425.

Here, on an unspecified date prior to December 14, 2007, when the court conducted an evidentiary hearing on

defendant's motions to suppress evidence and to suppress defendant's statements, defendant filed a motion seeking an order compelling the State to turn over Shomo's personnel file. At the December 14, 2007 suppression hearing, Shomo testified in accordance with his trial testimony. Although defendant testified at the suppression hearing, he did not testify to events that occurred at the motor vehicle stop. Rather, he confined his testimony to the ownership of the motor vehicle he was operating on the night of the incident, and to the fact that the vehicle subsequently passed inspection without any repairs being made to the rear license plate lights.

On December 27, 2007, defendant served a subpoena *duces tecum* on the Westville Borough's Chief of Police seeking production of the following documents:

1. A copy of the Computer Assisted Dispatch ("CAD") report(s) and/or radio log(s) under Westville Police Department Case # 200608785 involving Police Officer Michael Shomo (# 2110), Police Officer Brian Ewe and any other responding Westville Borough police officers;

2. For the front and back of all traffic summonses issued by Officer Shomo for violations of *N.J.S.A.* 39:3-66 and/or *N.J.S.A.* 39:3-74 and any investigation reports associated with said summonses since he became employed as a Westville Borough police officer approximately four (4) years ago through the present date;

***5** 3. A list of all individuals (including name, address and race) who have been charged in the Westville Borough Municipal Court or Gloucester County Superior Court by Officer Shomo with resisting arrest (*N.J.S.A.* 2C:29-1) and/or obstruction of justice (*N.J.S .A.* 2C:29-2) wherein Officer Shomo claimed to be the victim of such conduct since he became employed as a Westville Borough police officer approximately (4) four years ago through the present date;

4. For any standard Operating Procedures ("SOPs") in effect on or about September 17, 2006 concerning when and under what circumstances an officer can order a driver out of his/her motor vehicle;

5. For any SOP in effect on or about September 17, 2006 concerning when and under what circumstances an officer can use a chemical agent (such as "cap stun") on a citizen;

6. The quarterly reviews of Officer Shomo; and

7. Any and all documents concerning any internal affairs investigations of Officer Shomo (including any and all allegations of excessive force against him).

On the same day, defendant also served a subpoena *duces tecum* on the Westville Borough Municipal Court Administrator seeking the same items referenced in paragraphs 2 and 3 above, together with copies of "any private citizen complaints filed against Officer Shomo since he became employed as a Westville Borough police officer approximately four (4) years ago through the present date."

On January 8, 2008, the State filed a motion seeking to quash the two subpoenas. [3] On February 4, 2008, the court issued a written decision addressing defendant's motion seeking to inspect Shomo's personnel file and the State's motion to quash the subpoenas. Acknowledging that defendant asserted self-defense to the charge of resisting arrest, the court determined that defendant had shown a sufficient factual predicate to require Shomo's personnel file be inspected by the court *in camera,* after which the court would advise what documents, if any, should be disclosed to defendant. As to the two subpoenas, the court directed that the State produce documents referenced in paragraphs 1, 4, and 5 in the list attached to the subpoena served on the Chief of Police. The court granted the State's motion to quash the requests regarding documents contained in paragraphs 3, 6, and 7, "as those requests will be considered when the [c]ourt reviews the personnel record of the [o]fficer." The court also quashed the remaining document requests, determining that "the relevance of the evidence to this case [was] so attenuated that its probative value is slight."

Following the court's decision, the State presented Shomo's personnel file to the court and turned over certain other documents to defendant as directed by the court. On February 8, 2008, the court, after reviewing the personnel file with counsel in chambers, but not on the record, determined that the file did not contain any information relevant to the charges pending against defendant. It is against this record that defendant contends the trial court improperly granted the State's motion quashing the subpoenas as to certain documents he sought to obtain from the Westville Borough Chief of Police and Municipal Court Administrator. [4]

***6** Because we believe defendant may have improperly sought to obtain pre-trial discovery by way of the subpoenas *duces tecum,* rather than by filing a motion seeking an order

compelling the production of the documents, we treat the issue presented as if it had first come before the trial court on motion of defendant. In addressing defendant's argument, we acknowledge that some of the documents defendant sought by the subpoenas may be found outside of Shomo's personnel file, for example, copies of any complaints in the municipal court that may have been filed by or against Shomo. In such a case, defendant may have been entitled to receive copies of those complaints pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1 to -13. *See* Pressler, *Current N.J. Court Rules,* comment 7 on *R.* 1:9-2 (2010) ("Where public records are sought to be inspected for purposes of discovery rather than for introduction at trial, the proper procedural technique is an action pursuant to [The Open Public Records Act,] rather than the issuance of a subpoena duces tecum under this Rule").

However, when a defendant seeks to compel the State to produce documents, which are of the same type generally found in a police officer's personnel file, we conclude that the court should view the request through the lens of *Harris,* requiring the defendant to proffer a factual predicate that would make it "reasonably likely that the [documents] will bear such fruit and that the quest for [their] contents is not merely a desperate grasping at a straw." 316 *N.J.Super.* at 398, 720 A.2d 425 (internal quote and citation omitted). This is not such a case.

In *Harris,* we directed that the State turn over the arresting officer's personnel file for an *in camera* review, following leave to appeal from a post-judgment of conviction motion. The defendant had presented evidence that the arresting officer had taken money from him and his friends, had planted drugs on them, and had harassed them on other occasions prior to the incident leading to the arrest, *Harris, supra,* 316 *N.J.Super.* at 391, 720 A.2d 425; that the arresting officer was a drug user, *id.* at 399, 720 A.2d 425; that the arresting officer had been suspended from the police department, *id.* at 394, 720 A.2d 425; and a newspaper had reported that the police department was investigating the arresting officer for alleged shakedowns of other individuals. *Ibid.* Because we determined that the defendant had produced evidence of a factual predicate that would make it reasonably likely that information in the personnel file could affect the officer's credibility, we directed that the personnel file be turned over for an *in camera* review. *Id.* at 399, 720 A.2d 425.

Here, just the opposite is so. The record is devoid of any evidence that Shomo acted in an unlawful or in an inappropriate manner toward defendant or toward any other third parties. Shomo was subjected to an extensive and probing cross-examination during the suppression hearing, and yet a review of the transcript fails to disclose any improper conduct on his part during the motor vehicle stop. Defendant testified at the suppression hearing, but did not testify to any facts challenging Shomo's version of the events leading to the criminal charges. Although a criminal defendant is entitled to broad discovery, he or she "cannot transform the discovery process into an unfocused, haphazard search for evidence." *D.R.H., supra,* 127 *N.J.* at 256, 604 A.2d 89. Accordingly, applying our deferential standard of review of a trial court's evidentiary ruling, we find no abuse of discretion in the trial court's grant of the State's motion to quash defendant's discovery requests.

III.

***7** Defendant argues in Point IV of his brief that the trial court erred in determining that the State could use his 1991, 1998 and 1999 criminal convictions for purpose of impeachment. Defendant asserts that the prior convictions were too remote from the trial to be probative as to his credibility. He contends the trial court failed to balance the remoteness of the convictions against the nature of the crimes underlying the convictions to assess whether the relevancy of the evidence as to his credibility outweighed any prejudice to him. Defendant asserts that the court's erroneous ruling denied him his constitutional right to testify at trial. We disagree.

N.J.R.E. 609 provides in relevant part that "[f]or the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes." The party seeking to bar the admission of prior-conviction evidence bears the "burden of proof to justify [its] exclusion." *State v. Sands,* 76 *N.J.* 127, 144, 386 A.2d 378 (1978). The decision whether to admit such evidence "rests within the sound discretion of the trial judge." *Ibid.* Accordingly, we will not disturb a trial judge's decision to admit prior-conviction evidence unless we find a clear abuse of discretion. *Brown, supra,* 170 *N.J.* at 147, 784 A.2d 1244; *State v. Hutson,* 211 *N.J.Super.* 49, 53, 510 A.2d 706 (App.Div.1986), *aff'd,* 107 *N.J.* 222, 526 A.2d 687 (1987).

A trial court may exclude prior-conviction evidence "when the evidence's 'probative force because of its remoteness, giving due consideration to relevant circumstances such as

the nature of the crime, and intervening incarcerations and convictions, is substantially outweighed so that its admission will create undue prejudice.' " *State v. Hamilton,* 193 *N.J.* 255, 263-64, 937 A.2d 965 (2008) (quoting *Sands, supra,* 76 *N.J.* at 147, 386 A.2d 378). Thus, the key to admitting prior-conviction evidence is its remoteness. *Sands, supra,* 76 *N.J.* at 144, 386 A.2d 378. However,

> [r]emoteness cannot ordinarily be determined by the passage of time alone. The nature of the convictions will probably be a significant factor. Serious crimes, including those involving lack of veracity, dishonesty or fraud, should be considered as having a weightier effect than, for example, a conviction of death by reckless driving. In other words, a lapse of the same time period might justify exclusion of evidence of one conviction, and not another. The trial court must balance the lapse of time and the nature of the crime to determine whether the relevance with respect to credibility outweighs the prejudicial effect to the defendant. Moreover, it is appropriate for the trial court in exercising its discretion to consider intervening convictions between the past conviction and the crime for which the defendant is being tried. When a defendant has an extensive prior criminal record, indicating that he has contempt for the bounds of behavior placed on all citizens, his burden should be a heavy one in attempting to exclude all such evidence. A jury has the right to weigh whether one who repeatedly refuses to comply with society's rules is more likely to ignore the oath requiring veracity on the witness stand than a law abiding citizen. If a person has been convicted of a series of crimes through the years, then conviction of the earliest crime, although committed many years before, as well as intervening convictions, should be admissible.
>
> ***8** [*Id.* at 144-45, 386 A.2d 378.]

Here, defendant was convicted of second-degree aggravated sexual assault and of two fourth-degree offenses of criminal trespass in 1991; third-degree eluding in 1998; and fourth-degree unlawful possession of a weapon in 1999. Prior to trial, defendant sought to prohibit the State from using these convictions to impeach his credibility should he testify at trial on the basis that the convictions were too remote. The court determined that the convictions were not so remote as to prohibit the State from using them for impeachment purposes. However, because the court was concerned about the eluding conviction being similar to two of the charges against defendant, the court ordered all convictions sanitized, directing that the State could use the convictions on cross-examination but that any reference to them was to be limited to the degree of the crime and the date of the conviction. *See State v. Brunson,* 132 *N.J.* 377, 393, 625 A.2d 1085 (1993).

We discern no abuse of discretion by the trial court in determining that the State could use the three convictions to impeach defendant if he testified. Second-degree aggravated sexual assault is a serious offense. Defendant's criminal record from that conviction forward, which included two more indictable convictions, evidences his "contempt for the bounds of behavior placed on all citizens." *Sands, supra,* 76 *N.J.* at 145, 386 A.2d 378. Moreover, defendant also had an intervening municipal court conviction for disorderly conduct in January 1995. *State v. Irrizary,* 328 *N.J.Super.* 198, 204, 745 A.2d 550 (App.Div.) (holding that "a defendant's municipal court convictions can be considered in determining whether a defendant's prior convictions are too remote for impeachment purposes"), *certif. denied,* 164 *N.J.* 562, 753 A.2d 1154 (2000).

Affirmed.

All Citations

Not Reported in A.2d, 2010 WL 3075470

Footnotes

1 The arresting police officer also issued defendant three traffic summonses for failure to maintain required illuminating devices on his motor vehicle, *N.J.S.A.* 39:3-66; operating a motor vehicle with an obstructed view, *N.J.S.A.* 39:3-74; and possession of a CDS in a motor vehicle, *N.J.S.A.* 39:4-49.1.

2 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

3 We question the appropriateness of defendant seeking discovery via the two subpoenas *duces tecum.* The subpoenas directed the Chief of Police and the Municipal Court Administrator to appear, give testimony, and to "produce at the same time" the aforementioned documents. Contrary to civil procedure, "[t]here is no available deposition technique for general discovery" in criminal proceedings. Pressler, *Current N.J. Court Rules,* comment 1 on *R.* 3:13-2 (2010). Rather

"depositions in criminal actions are limited to the procedures and authorizations" contained in *Rule* 3:13-2. *Ibid.; see also Kaszubinski, supra,* 177 *N.J.Super.* at 141, 425 A.2d 711 (stating that "[t]he purpose of a subpoena *duces tecum* is to obtain the production of documents or other items that will aid in the development of testimony at trial. It is not appropriately employed as a discovery device in criminal proceedings.").

4 Although unclear in defendant's brief, it appears that he is not challenging the trial court's denial of his request for the State to turn over Shomo's personnel file as the court did review the file *in camera* with counsel. Accordingly, we considered defendant's argument limited to the denial of the documents contained in paragraphs 2, 3, 6 and 7 of the subpoena served upon the Chief of Police and in paragraph 3 of the subpoena served upon the Municipal Court Administrator seeking copies of any private citizens' complaints that may have been filed against Shomo.

End of Document

RICHARD RIVERA, Plaintiff-Petitioner, v. UNION COUNTY PROSECUTOR'S OFFICE and JOHN ESMERADO in his official capacity as Records Custodian for the Union County Prosecutor's Office, Defendants-Respondents, and CITY OF ELIZABETH, Intervenor-Respondent.	: SUPREME COURT OF NEW JERSEY DOCKET NO. 084867 Civil Action On Petition Granted from a Final Judgement of the Superior Court of New Jersey, Appellate Division Sat Below: Hon. Richard Geiger, J.A.D. Hon. Arnold L. Natali, Jr., J.A.D.

BRIEF AND APPENDIX OF AMICUS CURIAE, ATTORNEY GENERAL OF NEW JERSEY

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(609) 376-2948
Suzanne.Davies@law.njoag.gov
Attorney for Amicus Curiae,
Attorney General of New Jersey

ALEC SCHIERENBECK
RAYMOND R. CHANCE, III
Assistant Attorneys General
Of Counsel

SUZANNE DAVIES – ATTY NO. 075222013
VALENTINA M. DIPIPPO – ATTY NO. 034482011
Deputy Attorneys General
On the Brief

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PRELIMINARY STATEMENT

At its heart, this case is about how to balance the need for confidentiality in law enforcement internal affairs investigations with the public's interest in transparency. While reasonable minds can differ on the policy implications of that question, this brief addresses the two key legal frameworks that currently govern its resolution. First, this brief explains why internal affairs reports are not subject to release under the Open Public Records Act ("OPRA"). Second, this brief lays out how such reports can still be accessible under the common law in appropriate circumstances where the public interest in disclosure is especially compelling, and with redactions necessary to protect vital public and private interests. This is such a circumstance.

As a preliminary matter, all internal affairs materials – including the internal affairs report written at the conclusion of an investigation – are exempt from disclosure under OPRA. By its terms, OPRA excludes from public access records that are exempt under other statutes, regulations, or grants of confidentiality recognized by statute. See N.J.S.A. 47:1A-1 and -9. And under binding and decades-old Attorney General directives that the Legislature has by statute required every law enforcement agency to follow, internal affairs materials are strictly confidential. Accordingly, as the Appellate Division held below, OPRA does not provide an avenue for access to internal affairs materials.

The unavailability of these records under OPRA does not, however, mean internal affairs reports are always beyond the reach of public records requests. Under the common law right of access, such records may be disclosed where a careful balance suggests that the interests served by disclosure outweigh the interests in confidentiality. In conducting that balancing, courts must give heavy weight to the Attorney General's practice of holding internal affairs materials confidential to protect those who report and witness misconduct. If the identities of those who cooperate with such investigations became public, the functioning of the internal affairs process would grind to a halt. On the other hand, disclosure of internal affairs reports can serve vital ends. When the internal affairs process is working, transparency helps assure the public that officers who commit misconduct are being held to account. And when the internal affairs process is not working, public disclosure can help the public understand whether and how this important mechanism for police misconduct should be reformed.

As this case illustrates, there are circumstances where the public's interest in disclosure is particularly pronounced, such that an internal affairs report should with appropriate redactions be subject to release under the common law. Because the report at issue here involves a Director of Public Safety who committed misconduct involving matters of intense public interest, namely, race and sex discrimination, and under circumstances that have

already garnered substantial public attention, the public's interest in disclosure of the internal affairs report regarding his conduct is especially strong. As a result, this Court should reverse the Appellate Division's determination that the report is not subject to release under the common law and remand to the trial court in order to consider redactions to the report – including redactions to avoid any disclosure of those who initiated and cooperated with the underlying internal affairs investigation.

Significant care is needed to strike the balance between the interests of confidentiality and disclosure. The Attorney General is continually engaged in efforts to strengthen the internal affairs process and to promote trust in law enforcement, and will continue to explore whether and how to promote transparency in internal affairs. But wherever the precise line between transparency and confidentiality should be drawn in the run of cases, when in a particular case the balance of interests weighs decidedly in favor of disclosure, an appropriately redacted internal affairs report can be subject to release under the common law. That is enough to resolve this appeal.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Internal Affairs Policy & Procedures

The Criminal Justice Act of 1970 establishes the Attorney General as the State's Chief Law Enforcement Officer and charges the Attorney General with the "general supervision of criminal justice" throughout the State. N.J.S.A. 52:17B-98. The Act "gives the Attorney General broad law enforcement authority 'relating or pertaining to the enforcement and prosecution of the criminal business of the State and of any county,' N.J.S.A. 52:17B-101, and it calls for its liberal enforcement to achieve its purposes, N.J.S.A. 52:17B-98." Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 100 (2020) ("FOP"). The Act also vests the Attorney General with the power to "[f]ormulate and adopt rules and regulations for the efficient conduct of the work and general administration of the [Department of Law and Public Safety], its officers and employees." N.J.S.A. 52:17B-4(d).

In 1991, the Attorney General exercised that statutory authority in issuing the first Internal Affairs Policy and Procedures ("IAPP") Manual. See In re Atty. Gen. Law Enforcement Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 483 (2021) ("In re AG Directives"). And in 1996, the "the Legislature directed every

[1] Because they are closely related, the procedural history and facts are combined for efficiency and convenience, and are limited to the information pertinent to the Attorney General's participation as amicus curiae.

law enforcement agency in the State, including local police departments, to 'adopt and implement guidelines which shall be consistent with the guidelines governing the [IAPP].'" Ibid. (quoting N.J.S.A. 40A:14-181).

The IAPP establishes "a comprehensive set of procedures to address 'allegations of officer misconduct or the improper delivery of police services,' for the purposes of 'bolster[ing] the integrity of the police department.'" Ibid. (quoting 1991 IAPP at 15). "According to the IAPP, every law enforcement agency must establish an [internal affairs or "IA"] unit, whose role and functions involve investigating complaints of misconduct, monitoring and tracking officer behavior for incidents of misconduct, and correcting misconduct when it occurs." FOP, 244 N.J. at 100-01. The IAPP establishes the "procedures that must be followed to receive, investigate, and resolve complaints of misconduct, including safeguards to protect confidential information." Id. at 101. "Among the mandatory provisions are requirements that each agency establish and maintain a confidential process, including an IA records system, which must include an IA index and filing system for all documents and records." Ibid.

In the course of an internal affairs investigation, a wide range of materials may be collected and maintained in an internal

affairs file. IAPP § 9.3.1.[2] Sometimes, the file may "consist of only the initial report form and the appropriate disposition document." Ibid. "On the other hand, investigation files might include extensive documentation of an investigation." Ibid. In either event, the "internal affairs investigation file should contain the investigation's entire work product" including the "investigators' reports, transcripts of statements, and copies of all relevant documents." IAPP § 9.3.2. By contrast, an internal affairs report is a written report prepared "[a]t the conclusion of the internal affairs investigation" and "consist[s] of an objective investigative report recounting all of the case's facts and a summary of the case, along with conclusions for each allegation, and recommendations for further action." IAPP § 9.1.1. The report may be voluminous, as it should state "all the relevant information the investigation disclosed, including statements, documents and other evidence." Ibid. (emphasis added).

Under § 9.6.1 of the IAPP, the "nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information." The IAPP provides that "information and records of an internal affairs

[2] Unless otherwise noted, citations to the IAPP are to the current version, issued in June 2021 and available at https://www.nj.gov/oag/iapp/docs/AG%20Directive%202021-6%20IAPP%20June%202021_All-Documents.pdf. Although the 2017 version was in effect when Rivera filed this action, the subsequent revisions to the IAPP do not affect the issues in this appeal. See PCa25 n.2.

investigation shall only be released or shared under the following limited circumstances":

> (a) If administrative charges have been brought against an officer and a hearing will be held, a copy of all discoverable materials shall be provided to the officer and the hearing officer before the hearing;
>
> (b) If the subject officer, agency or governing jurisdiction has been named as a defendant in a lawsuit arising out of the specific incident covered by an internal investigation, a copy of the internal investigative reports may be released to the attorney representing the subject officer, agency or jurisdiction;
>
> (c) Upon the request or at the direction of the County Prosecutor or Attorney General; or
>
> (d) Upon a court order.
>
> [Ibid.]

Separately, the IAPP provides that a "law enforcement executive may authorize access to a particular file or record for good cause." IAPP § 9.6.2.

Over the years, the IAPP has been amended many times to strike an evolving balance between the interest in confidentiality in internal affairs investigations and the need to both strengthen accountability and promote trust in law enforcement. In re AG Directives, 246 N.J. at 483-84. For example, in 2019 the IAPP was revised to clarify that internal affairs materials may be shared with another law enforcement agency that requests records related to a current or former officer that the agency may hire, as well

as with a Civilian Review Board that meets certain procedural safeguards. See Attorney General Law Enforcement Directive No. 2019-5, at 4-5.[3] Similarly, in 2020, the IAPP was twice amended to require officers subject to certain serious discipline in response to misconduct be identified publicly. See In re AG Directives, 246 N.J. at 484.

But the Attorney General also concluded that although these additional steps in the direction of transparency were critical to public trust and effective law enforcement, the State was not yet prepared to disclose all internal affairs materials. See Atty. Gen. Law Enforcement Directive No. 2020-5 ("Directive 2020-5"), at 1.[4] The reasons for that decision include "the need to protect those who report and witness police misconduct"; danger that "[c]omplainants might be unwilling to report misconduct if they knew that their names would ultimately be disclosed publicly"; and concern that "witnesses – including officers asked to testify against a colleague – might be unwilling to cooperate in an inquiry if they knew that their statements would be available for public inspection." Ibid. Where, however, these important interests can be met while increasing transparency, the Attorney General has not

[3] Available at https://www.nj.gov/lps/dcj/agguide/directives/ag-Directive-2019-5.pdf.

[4] Available at https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-5_Major-Discipline.pdf.

hesitated to make "substantial revisions" to the IAPP to expand disclosure obligations. Id. at 2.

B. The Proceedings Below

In February 2019, employees of the Elizabeth Police Department filed an internal complaint alleging that James Cosgrove, then the Director of the Department, had over the course of many years used racist and sexist epithets when referring to his staff. PCa24; Da25-27.[5] In response, the Union County Prosecutor's Office (UCPO) assumed responsibility for the internal affairs functions of the Elizabeth Police Department and conducted an internal affairs investigation into the allegations. Da25-27. Ultimately, after two months of inquiry, that investigation concluded that Cosgrove had violated Elizabeth's anti-discrimination and anti-harassment policies. Ibid.

When news of the investigation became public, it garnered significant public attention. See, e.g., Da319-23, Rebecca Everett, N.J. City's Police Director Used N-word and Sexist Language Toward Staff, Prosecutor's Office Finds, NJ.com, Apr. 23, 2019; Da29-33. And on April 26, 2019, then-Attorney General Grewal took swift action. See Da35-36, Statement of Gurbir S. Grewal; Da29-33; PCa24. In a public statement, the Attorney General

[5] "PCa" refers to Petitioner Richard Rivera's Appendix in Support of Petition for Certification. "Da" refers to Defendant-Intervenor-Respondent City of Elizabeth's Appendix in support of Appeal. "AGa" refers to Amicus Curiae Attorney General's Appendix.

acknowledged that "[o]ne of the core responsibilities of an effective law enforcement leader is to maintain the trust of the community he or she serves." Da35. But according to the Attorney General, "Director Cosgrove ha[d] violated that trust and, in doing so, undermined confidence in our system of justice." Ibid. Invoking his authority under the Criminal Justice Act, the Attorney General designated the First Assistant Attorney General to serve as Acting Prosecutor of Union County in order to "ensure that UCPO exercises appropriate oversight of the Elizabeth Police Department and works to rebuild trust with the community and external stakeholders." Ibid. The Attorney General ordered an audit of the Elizabeth Police Department's workplace culture, and directed additional training on matters of implicit bias and sexual harassment. Ibid. And he called on Director Cosgrove to resign his position immediately. Ibid. Shortly thereafter, Director Cosgrove resigned. Da330-35.

In July 2019, Richard Rivera submitted a request to the UCPO seeking, as relevant, all internal affairs reports regarding Cosgrove under both OPRA and the common law. PCa25; Da058. The UCPO denied the request on the ground that "the report prepared by this Office regarding its internal affairs investigation into allegations of inappropriate work place conduct by" Cosgrove was exempt from disclosure under OPRA as "Personnel and/or internal affairs records" and that, as to Rivera's common law request, the

"interest[s] in maintaining confidentiality significantly outweigh [plaintiff's] interests in disclosure." Da61-64. Among other things, the UCPO cited the chilling effect that disclosure would have on those reporting wrongdoing, and certain remedial measures that had been taken - including Cosgrove's resignation and new training measures within the Elizabeth Police Department. Da63-64.

On August 21, 2019, Rivera filed a Verified Complaint and Order to Show Cause against the UCPO. Ibid. On February 6, 2020, the trial court partially granted Rivera's application under OPRA and required the UCPO to produce "'all aspects' of the UCPO's investigation" for in camera review in order to determine any necessary redactions. PCa28. The trial court did not reach Rivera's common law right of access claim. PCa29.

The Appellate Division reversed the court's order compelling UCPO to produce the internal affairs materials for in camera review. PCa41. As to OPRA, the Appellate Division concluded that internal affairs records are exempt from disclosure under N.J.S.A. 47:1A-1 and -9, which provide that OPRA does not "abrogate any exemption of a public record or government record from public access" pursuant to "any . . . statute"; "regulation promulgated under the authority of any statute"; or "grant of confidentiality . . . recognized by . . . statute." N.J.S.A. 47:1A-9; see also N.J.S.A. 47:1A-1; PCa35. As the court explained, the Attorney

General adopted the IAPP under his statutory authority to adopt guidelines, directives, and policies that bind law enforcement. See N.J.S.A. 52:17B-97 to -117. The IAPP, in turn, makes internal affairs records confidential. PCa38 (citing IAPP § 9.6.1). And because the Legislature has by statute directed "[e]very law enforcement agency" to "adopt and implement guidelines" consistent with the IAPP, N.J.S.A. 40A:14-181, internal affairs records are "exempt[]" from access under OPRA by statute and regulation, N.J.S.A. 47:1A-9. See PCa40.

The Appellate Division likewise rejected Rivera's common law request, holding that "the need for nondisclosure substantially outweighs plaintiff's need for disclosure." PCa53. The court observed that disclosure of internal affairs reports could have a "far reaching negative impact, impairing the laudable goals of IA investigations." PCa41. It stated that "disclosure of the complainants, witnesses, and subject officers could: reveal the name and location of inmates and informants, which may subject them to harm; discourage complainants from coming forward because they will not maintain anonymity; and encourage unwarranted complaints to seek notoriety or target an officer for reasons other than wrongdoing." PCa42-43. And it reasoned that while appropriate redactions could potentially avoid many of these negative consequences, "that task would likely prove very difficult, if not impossible." PCa43.

On September 11, 2020, Rivera filed a Petition for Certification with the Court, which was granted on May 14, 2021. On May 25, 2021, the Court invited the Attorney General to appear as amicus curiae.

POINT I

INTERNAL-AFFAIRS RECORDS ARE EXEMPT FROM DISCLOSURE UNDER OPRA.

By its plain terms, OPRA does not compel the disclosure of any "public record or government record" which is "exempt[]" from disclosure under "any other statute"; "regulation promulgated under the authority of any statute"; or a "grant of confidentiality . . . established or recognized by . . . statute." N.J.S.A. 47:1A-9; see also N.J.S.A. 47:1A-1 ("all government records shall be subject to public access unless exempt from such access by . . . any other statute" or "regulation promulgated under the authority of any statute"). A simple syllogism confirms that this exemption to OPRA disclosure applies here. Under the IAPP, internal affairs materials are "confidential information" subject to narrow exclusions that do not include OPRA. IAPP § 9.6.1; see supra at 7. As this Court has held, "[t]he IAPP . . . carries the force of law for State and local law enforcement." In re AG Directives, 246 N.J. at 487-88. And so because directives are binding rules issued under clear statutory authority, and because the Legislature has by statute required law enforcement agencies to abide by the

strictures of the IAPP, internal affairs materials are necessarily exempt from disclosure under OPRA. FOP, 244 N.J. at 101, 106.

The Attorney General's "authority to adopt guidelines, directives, and policies that bind police departments throughout the State" is well settled. N. Jersey Media Grp. v. Twp. of Lyndhurst, 229 N.J. 541, 565 (2017); see also In re AG Directives, 246 N.J. at 487 ("As the Court has recognized on prior occasions, Attorney General directives relating to the administration of law enforcement have the 'force of law.'"); FOP, 244 N.J. 75, 100-01; Paff v. Ocean Cty. Prosecutor's Off., 235 N.J. 1, 20-21 (2018). This is particularly so in the case of the IAPP. FOP, 244 N.J. at, 100-01, 105-07. In 1996, the Legislature passed a statute that requires all law enforcement agencies in the state to

> adopt and implement guidelines which shall be consistent with the guidelines governing the "Internal Affairs Policy and Procedures" of the Police Management Manual promulgated by the Police Bureau of the Division of Criminal Justice in the Department of Law and Public Safety, and shall be consistent with any tenure or civil service laws, and shall not supersede any existing contractual agreements.
>
> [N.J.S.A. 40A:14-181.]

This provision, "Section 181[,] effectively made the AG's IAPP required policy for all municipal law enforcement agencies in New Jersey." FOP, 244 N.J. at 101.

Section 181 expressly "embraces the Attorney General's policy on internal affairs matters by directing law enforcement agencies throughout the state to adopt guidelines consistent with the IAPP." In re AG Directives, 246 N.J. at 488. Thus, "the Legislature plainly intended that the Attorney General's standards and protocols be followed by law enforcement agencies," including its provisions respecting confidentiality. FOP, 244 N.J. at 103. Indeed, when Section 181 was enacted, the IAPP in effect at that time clearly provided that the "progress of internal affairs investigations and all supporting materials are considered confidential information" and that the "contents of the internal investigation case files" are "confidential." AGa20-21, 1992 IAPP; see In re AG Directives, 246 N.J. at 488 (explaining that the 1992 IAPP, in effect when section 181 was enacted, "declared that police executives, like the Attorney General, could release disciplinary records"). The IAPP's confidentiality provisions thus bind all local agencies by operation of both Attorney General directive and statute. Here, "[i]n accordance with N.J.S.A. 40A:14-181, the UCPO adopted and implemented policies consistent with the IAPP to govern its IA investigations." PCa40.

In keeping with Attorney General's authority, this Court has repeatedly held that the terms of a directive can determine the applicability of an OPRA exemption. Most recently, in In re AG Directives, this Court considered whether N.J.S.A. 47:1A-10, which

exempts "personnel or pension records" from public access under OPRA, prevented the Attorney General from publicly releasing certain disciplinary records pursuant to his authority under the IAPP. 246 N.J. at 486-88; see also IAPP § 9.6.1 (authorizing the disclosure of otherwise confidential internal affairs information "at the direction of . . . the Attorney General."). As the Court explained, OPRA's personnel exemption shields personnel records unless "'otherwise provided by law.'" In re AG Directives, 246 N.J. at 488. And because the IAPP – which "carries the force of law for State and local law enforcement" under both the Attorney General's "power to issue directives" and Section 181 – permitted the Attorney General to release such records, OPRA's personnel exemption did not apply.[6] Ibid. The same is true here. Because OPRA exempts records shielded by "any other statute"; "regulation

[6] In this case, by contrast, the personnel exemption would likewise exempt internal affairs records from disclosure, as the Appellate Division has reasoned. See Libertarians for Transparent Gov't v. Cumberland Cty., 465 N.J. Super. 11, 13 (App. Div.), certif. granted, 245 N.J. 38 (2021) (holding "an internal disciplinary action against a public employee . . . is a personnel record exempt from disclosure under section 10 of [OPRA]"); Gannett Satellite Info Network, LLC v. Twp. of Neptune, ___ N.J. Super. ___, ___ (App. Div. 2021) (slip op. at 24). The unpublished decision on review, which took a different view of the personnel exception, is thus an outlier. See PCa34-5. But because internal affairs records are clearly exempt from disclosure under N.J.S.A. 47:1A-9, this Court need not address whether such records are exempt under the personnel exemption as well. Likewise, individual internal affairs files will frequently also qualify for other exemptions not relevant here, such as the criminal investigatory records exemption. Cf. Paff, 235 N.J. at 6.

promulgated under the authority of any other statute"; or a "grant of confidentiality . . . recognized by . . . statute," N.J.S.A. 47:1A-9, and because the longstanding IAPP expressly treats internal affairs materials as confidential and shields them from public release, see IAPP § 9.6.1, internal affairs materials have long been exempt from disclosure under OPRA.

Similarly, in Lyndhurst, this Court considered whether Use of Force Reports are exempt from disclosure under OPRA's criminal investigatory records exemption, N.J.S.A. 47:1A-1.1. Lyndhurst, 229 N.J. at 565. "[T]o qualify for that exception — and be exempt from disclosure – a record (1) must not be 'required by law to be made,' and (2) must 'pertain[] to a criminal investigation.'" Id. at 564. Because the Attorney General, pursuant to his "authority to adopt guidelines, directives, and policies that bind police departments throughout the State" issued a Use of Force Policy that required police departments to create Use of Force Reports in the first place, this Court found that the reports were "'required by law to be made'" and thus "cannot be exempt from disclosure under OPRA's criminal investigatory records exemption.'" Id. at 565-66 (quoting N.J.S.A. 47:1A-1.1). In other words, in Lyndhurst as in In re AG Directives, the application of an OPRA exemption turned on "the directives and policies of the Attorney General." Lyndhurst, 229 N.J. at 566.

Recently, the Appellate Division expressly applied the same reasoning to the question at issue here and held that internal affairs files are exempt from disclosure under N.J.S.A. 47:1A-1 and -9. See Gannett Satellite Info Network, LLC v. Twp. of Neptune, (slip op. at 24). As it explained, "consistent with Fraternal Order of Police . . . the IAPP has the force of law and pursuant to N.J.S.A. 47:1A-9, OPRA may not abrogate the IAPP's confidentiality provisions." Ibid. In the decision below, the Appellate Division likewise determined that OPRA does not override the IAPP's confidentiality requirements, because these confidentiality rules have the force of law for all police departments under both the Attorney General's organic statutory authority and under the IAPP-specific statutory command in Section 181.[7] PCa35-40.

As the Appellate Division explained, allowing access under OPRA to turn on the scope of a Directive does not mean that the Attorney General can somehow override OPRA "through a Directive." In re Atty. Gen. Law Enforcement Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 144 (App. Div. 2020). After all, it is the

[7] The Appellate Division also rightly rejected the argument that internal affairs materials are subject to release under OPRA because the IAPP acknowledges that such materials may be released "[u]pon a court order." IAPP § 9.6.1(d). As the court explained, that provision of the IAPP simply acknowledges that a "court may order the release of an IA investigation case file when appropriate to do so"; it "does not create an independent substantive basis for release" within the meaning of OPRA. PCa40-41.

Legislature that "expressly provided 'the Attorney General statutory power to adopt guidelines, directives, and policies that bind law enforcement throughout the State'" and ensured OPRA would not abrogate confidentiality protections established elsewhere in the law. Ibid. (quoting Paff, 235 N.J. at 20-21). "Nowhere is that clearer than in the case of the IAPP, which the Legislature has expressly required every law enforcement agency in the State follow" in Section 181. Id. at 145. In other words, the Attorney General has not arrogated the authority to make such files confidential; the Legislature has seen fit to grant him that authority by mandating compliance with the IAPP, even after the IAPP included such language.

Accordingly, internal affairs reports are not subject to release under OPRA.

POINT II

UNDER THE COMMON LAW RIGHT OF ACCESS, SOME APPROPRIATELY REDACTED INTERNAL AFFAIRS REPORTS ARE SUBJECT TO RELEASE.

Although internal affairs reports are not available under OPRA, there is another path for the public to request access: the common law. Subject to redactions necessary to protect the integrity and efficacy of the internal affairs process – and the legitimate privacy interests of complainants, witnesses, officers, and victims – there are some circumstances where internal affairs reports can be disclosed under the common law. And because the

common law, unlike OPRA, entails a case-specific analysis of whether disclosure is appropriate, it is far better suited than OPRA to the sensitive task of determining what reports rise to the level where disclosure is necessary. See, e.g., Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 302 (2009) ("'[U]nlike a citizen's absolute statutory right of access" under OPRA, "a plaintiff's common-law right of access must be balanced against the State's interest in preventing disclosure.'") (citing Higg-A-Rella, Inc. v. Cty. of Essex, 141 N.J. 35, 46 (1995)).

Under the common law, records may be disclosed even if they would not have been subject to release under OPRA. See N.J.S.A. 47:1A-8 ("Nothing contained in [OPRA] shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.").[8] "Although similar considerations arise under both OPRA and the common law . . . OPRA does not compel the outcome under the common law test." Lyndhurst, 229 N.J. at 578. To obtain records under the common law, a requestor must demonstrate that the public's "'interest in the subject matter of the material'"

[8] "To constitute a common law public record, the item must be 'a written memorial[] . . . made by a public officer, and . . . the officer [must] be authorized by law to make it.'" Lyndhurst, 229 N.J. at 587 (citation omitted). Because internal affairs reports are written reports that the IAPP requires an investigator to make at the conclusion of an investigation, that requirement is indisputably satisfied here. See IAPP § 9.1.1.

outweighs "'the State's interest in preventing disclosure.'" Ibid. (quoting Mason v. City of Hoboken, 196 N.J. 51, 67-68 (2008)). "Determining, then, the appropriate balance of public and private interests calls for an 'exquisite weighing process'" of the competing interests. Loigman v. Kimmelman, 102 N.J. 98, 108 (1986). In that balancing, "a determination by the Executive Branch of the importance of confidentiality" "weighs 'very heavily.'" Home News v. State, Dep't of Health, 144 N.J. 446, 455 (1996).

As a result, the IAPP's longstanding treatment of internal affairs materials as confidential should be given proper weight in the consideration of any common law request in this delicate area, cutting against disclosure absent "a clear showing of advancement of the public interest to warrant disclosure." Loigman, 102 N.J. at 108 ("Given the legislative determination that such confidential accounts would ordinarily be subjected only to the scrutiny of the Attorney General, a judge must be convinced of a clear showing of advancement of the public interest to warrant disclosure."). Indeed, as the IAPP has consistently maintained, and as this Court recognized, important interests are served by confidentiality in internal investigations. Most critically, the confidentiality of such investigations "encourage[s] people to come forward" with complaints and to "cooperate, sure of that confidentiality." FOP, 244 N.J. at 106. "Complainants might be

unwilling to report misconduct if they knew that their names would ultimately be disclosed publicly." Directive 2020-5 at 1. "Similarly, witnesses – including officers asked to testify against a colleague – might be unwilling to cooperate in an inquiry if they knew that their statements would be available for public inspection," as they may fear personal or professional reprisal. Ibid. Confidentiality thus serves "the government's need to conduct such affairs with skill, with sensitivity to the privacy interests involved, and in an atmosphere of confidentiality that encourages the utmost candor." Loigman, 102 N.J. at 107. After all, absent the cooperation and trust of complainants and others, the ability of the internal affairs process to accomplish its most fundamental purpose – holding officials accountable for misconduct – would grind to a halt. See id. at 107-08 (recognizing the "vital public interest" in the confidentiality of "witnesses and informants").

Similarly, law enforcement officers, as well as complainants, witnesses, victims, and third parties, frequently have legitimate privacy interests in the confidentiality of internal affairs materials. For example, internal affairs materials may include personal identifying information, such as a home address; medical information; information in which a person has a reasonable expectation of privacy; or information pertinent to ongoing criminal investigations. In cases where a complaint of misconduct

is thoroughly investigated and determined to be unsubstantiated or unfounded, officers have a heightened interest in the nondisclosure of unproven allegations. Thus, even aside from any chilling effect on those who initiate and cooperate with an internal affairs investigation, disclosure of internal affairs materials would in many cases endanger "the privacy rights of individuals who may be mentioned in certain reports." Id. at 109.

Reflecting many of these same considerations, in Loigman, this Court offered an illustrative list of the factors that may weigh against disclosure of investigative materials:

> (1) The extent to which disclosure would impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision making will be chilled by disclosure; (4) the degree to which information sought includes factual data as opposed to evaluative reports of policy-makers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
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> [Loigman, 102 N.J. at 113.]

On the other side of the ledger, there are vital interests served by disclosure of internal affairs reports. The internal

affairs process is critical to holding officers accountable, deterring future misconduct, and making clear to the public that misconduct within law enforcement will not be tolerated. When the internal affairs process functions well, it fosters badly-needed trust between police and community – and that trust-building effect is magnified when the public can see for itself that the internal affairs process is working. See Lyndhurst, 229 N.J. at 579 (noting that release of materials "may also reassure the public that the police acted professionally and lawfully – another legitimate public interest."). In turn, when the internal affairs process does not function well, transparency permits the public to understand how and why it has failed to meet its important purpose, and what reforms are needed to improve accountability.

Particular cases, moreover, implicate a heightened public interest in disclosure, and could warrant disclosure even when a report in a routine case may not. When an investigation involves alleged misconduct by a high-ranking law enforcement official, the public has a special interest in disclosure rooted in the reasonable inference that wrongdoing among leadership can infect an entire department. Similarly, an internal affairs investigation that results in serious discipline, such as termination, resignation, or a substantial suspension, can lead to an enhanced public interest in understanding the underlying transgression that warranted a severe sanction.

So too, some categories of alleged misconduct attract particular public attention, giving rise to a concomitant need for the public to understand whether the internal affairs process is handling such matters with the gravity they deserve. "[T]he public's strong interest in a police shooting that killed a civilian," which may concern a potentially inappropriate use of deadly force, is one such case. Lyndhurst, 229 N.J. at 580. Alleged misconduct involving discrimination or bias arouses fear that law enforcement is hostile or unresponsive to historically underserved communities, especially communities of color. In these situations, the need to make clear that the internal affairs process is effectively responding to, and rooting out, every manner of discrimination is magnified. And when the subject of an internal affairs investigation has already proven to attract considerable public attention, the public's interest in the additional context that will come from release of an internal affairs report is obviously heightened as well.

These competing interests – the need for confidentiality and the benefits of transparency - call for a delicate balance. In keeping with recent efforts to promote trust and accountability in law enforcement, the Attorney General is continually examining how best to harmonize these countervailing concerns. But at minimum, certain salient factors help indicate whether the public has a heightened interest in transparency, as this Court could make

clear, as part of its broader consideration of the usual Loigman factors:

- Whether the alleged misconduct was substantiated;

- The nature and gravity of the harm caused by the misconduct, including:

  - Whether the misconduct involved excessive or deadly force;
  - Whether the misconduct involved discrimination or bias; or
  - Whether the misconduct involved an abuse of public trust;

- The nature and gravity of the discipline imposed (i.e., whether it resulted in termination, resignation, or a substantial suspension);

- The seniority of the law enforcement official(s) involved in the misconduct; and

- Whether the misconduct has already been the subject of substantial public interest.

As applied here, these considerations strongly suggest that disclosure of the internal affairs report at issue in this case is appropriate.[9] The report concerns substantiated misconduct by a high-ranking official – the director of a police department.[10] The

[9] Because this appeal concerns disclosure of an internal affairs report, this Court need not address the circumstances under which the common law can provide access to internal affairs materials aside from an internal affairs report.

[10] In some cases, reports may include both substantiated and unsubstantiated allegations. As a result, in some circumstances, a court could determine that portions of a report related to substantiated allegations are subject to release, while portions of a report concerning unsubstantiated allegations are not. Here, while it is clear that portions of the report concern substantiated

misconduct at issue involved discrimination and bias involving race and sex. The transgression concerned is so severe that the director resigned in the wake of the investigation. And the circumstances investigated in the report have already been the subject of substantial public interest and controversy. Wherever the line is to be drawn between confidentiality and disclosure in the run of internal affairs cases, this request concerns a document that should, subject to appropriate redactions, be disclosed.[11]

Critically, however, even where a court determines – as a threshold matter – that an internal affairs report should, in some form, be disclosed, courts must undertake a careful review of a report to determine whether particular information in the report should remain confidential. See S. Jersey Publ'g Co. v. N.J.

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misconduct, the courts below did not consider whether there may be portions of the report relating to possible unsubstantiated allegations and, if so, whether those portions are not subject to disclosure under the common law's multifactor balancing. That issue should be considered on remand.

[11] In some cases, a detailed in camera review of an internal affairs report will be necessary to determine whether the interests in disclosure outweigh the interests in confidentiality. See, e.g., Lyndhurst, 229 N.J. at 580 ("To conduct the careful balancing that each case – and this sensitive area – require," courts must "look at the level of detail contained in the materials requested."); Higg-A-Rella, 141 N.J. at 49 (noting the Court's decision that certain records are subject to disclosure under common law was "[f]act-specific, and may not be generalized to all cases"). Here, however, the undisputed facts about the nature and circumstances of the report – including the seniority of the officer, the type of misconduct involved, the resignation, and the substantial public interest in this episode – confirm that at least some disclosure of the report is appropriate.

Expressway Auth., 124 N.J. 478, 499 (1991) (instructing Law Division to consider redactions under the common law). Most important, and relevant here, the names of complainants, witnesses and cooperators, as well as any information that would disclose or could reasonably lead to the discovery of their identities, must be redacted. Failing to redact such personal and sensitive information would seriously hamper the basic functioning of the internal affairs process and undermine the public's interest in an effective mechanism for police accountability.

Other redactions are also appropriate. Because "similar considerations arise under both OPRA and the common law," Lyndhurst, 229 N.J. at 578, a court may find the exemptions contained in OPRA instructive – though not determinative – in assessing whether particular information should be redacted from release under the common law. See Paff, 235 N.J. at 29 (noting that in Lyndhurst the common law inquiry reflected the same "'core concerns' arising under N.J.S.A. 47:1A-3(a)"). Among other things, the common law should, as under OPRA, not be understood to compel disclosure of information that would violate a "citizen's reasonable expectation of privacy," N.J.S.A. 47:1A-1; emergency or security information that would jeopardize safety, see N.J.S.A. 47:1A-1.1, Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 164 (2016); or records pertaining to an ongoing investigation, N.J.S.A. 47:1A-3(a).

Thus, in addition to redacting the identities - and any information that would disclose or reasonably lead to the discovery of the identities - of complainants, cooperators and witnesses, at minimum the following information should also be redacted from an otherwise disclosable internal affairs report:

- Addresses and non-public personal identifying information of officers and third parties (i.e. home addresses, telephone numbers, social security numbers, etc.);

- Any possible medical history and/or detailed medical information for officers and third parties;

- Personal information that, if disclosed would violate a person's reasonable expectation of privacy;

- Information that would disclose or reasonably lead to the disclosure of information related to: an officer's participation in any mental health or drug or alcohol evaluation, counseling or treatment program; an officer's participation in any officer resiliency program approved or implemented consistent with guidance provided by the Attorney General; any history of the officer's access to public assistance programs; or any corrective measures undertaken by an officer in response to an early warning system approved by or implemented consistent with guidance provided by the Attorney General, except when such corrective measures involve the imposition of discipline or requirement of further training;

- Information regarding emergency or security procedures used by a law-enforcement agency that, if disclosed, would jeopardize the security of the agency or an officer;

- Information regarding any security measures or surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software;

- Information regarding any ongoing state, county, or federal criminal investigation or prosecution that is not contained in a public filing;

- Any other information that would impede or interfere with a pending disciplinary or criminal proceeding – in such cases, disclosure should occur immediately upon conclusion of the relevant proceeding; and

- Information as to which disclosure is prohibited by state or federal law.

Together, redaction of this information will help ensure that disclosure can serve important public interests in transparency without jeopardizing the integrity of the internal affairs process, disregarding legitimate expectations of privacy, or harming other important interests.

Because the court below did not perform a detailed review of the internal affairs report at issue here in order to determine what redactions are necessary under the common law, this Court should remand the case to the trial court so that it can perform the requisite analysis, while making clear the relevance of the above-described factors. See S. Jersey Publ'g, 124 N.J. at 499 (remanding to Law Division for "in camera review . . . to ascertain whether redaction is necessary."); Paff, 235 N.J. at 30 ("We remand this matter to the trial court so that the court may address plaintiff's claim of a common-law right of access.").

CONCLUSION

For these reasons, the Court should affirm the decision of the Appellate Division that internal affairs materials are exempt from disclosure under OPRA, but reverse its decision with respect to the common law and remand to the trial court so that it may determine what redactions are appropriate.

Respectfully submitted,

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _s/ Suzanne Davies_____
Suzanne Davies (ID#075222013)
Deputy Attorney General

Dated: August 27, 2021

INTERNAL AFFAIRS
Internal Affairs Policy & Procedures

Issued August 1991
Revised November 1992

Dear Chief Executive:

The delivery of effective police service depends in large measure on the quality of leadership by the agency's chief executive. We all recognize the importance to police executives of timely and practical management resources.

For several years the Division of Criminal Justice and the New Jersey State Association of Chiefs of Police have worked together to develop the Police Management Manual as a standard for municipal police management. The manual is designed to provide police executives with practical guidelines necessary to address day-to-day operational concerns.

I am pleased to provide you with Chapter five of the Police Management Manual, "Internal Affairs Policy and Procedures" which deals with a matter of extreme importance to everyone in law enforcement. This chapter, which was prepared after consultation with numerous law enforcement officials, serves as a supplement to the New Jersey Law Enforcement Agency Standards Program begun in October of last year by the Division of Criminal Justice and the State Chiefs Association. It contains standards, policies and procedures for the internal affairs function.

Some highlights of "Internal Affairs Policy and Procedure" include:

It advocates the establishment of a formal Internal Affairs Unit or function in each police agency. While assignment of personnel may be on a full or part time basis, a structure must be in place to objectively review complaints of officer misconduct.

It calls for police departments to accept citizen complaints about police conduct from any person 24 hours a day, seven days a week, including anonymous complaints.

It provides for a police department representative to visit the complainant if the complainant cannot file the report in person.

It calls for all complaints about police officer conduct to be thoroughly and objectively investigated to their logical conclusions.

It calls for the immediate notification of the county prosecutor in the event of any allegation of criminal misconduct by a police officer, or whenever a firearms discharge results in an injury or death.

It provides that the accused officer is accorded all of the appropriate due process rights in the internal disciplinary process. This includes the right to be notified of the outcome of all complaint investigations.

It instructs that citizen complainants be advised of the outcome of an internal investigation or disciplinary proceeding.

It provides police departments with detailed information and guidelines on conducting thorough internal investigations of any complaints about police conduct.

It provides police departments with a sample Internal Affairs policy and procedures, as well as sample formats for use in the disciplinary process.

It calls for an annual report summarizing the types of complaints received and the dispositions of the complaints to be made available to the public. This report would not contain the names of complainants or the accused officers.

As I am sure you will agree, citizen confidence in the integrity of a police department is enhanced by the establishment of meaningful and effective complaint resolution procedures. Toward that end, this chapter is a reflection of our interest in having all police agencies in this state adopt and conscientiously implement these procedures for the handling of citizen complaints.

Recognizing the key role played by officers assigned to the internal affairs function, it is important that they are properly prepared for the task. In the near future we will be establishing a training program for those officers assigned by you to internal affairs responsibilities. Additional details concerning this program will be forthcoming in order that you may identify personnel

from your agency who would benefit from such training.

If you have any questions about this chapter or any other portion of the Police Management Manual, please call the Division of Criminal Justice, Police Services Section at (609) 984-0960.

Robert J. Del Tufo
Attorney General

August 14, 1991 (1st Edition Release)

PART ONE
INTERNAL AFFAIRS AND THE DISCIPLINARY PROCESS

Introduction

Achieving the desired level of discipline within the police agency is among the most important responsibilities of the police executive. Yet, this is one of the most frequently neglected and outdated processes existing within many police agencies. While the word "discipline" was originally defined as instruction, teaching or training, its meaning has shifted toward a concept of control. This emphasis on control has resulted in discipline being viewed as a negative threat rather than a mechanism for instruction and counseling. Too frequently rules of conduct and disciplinary procedures are used as an end in themselves, their purpose as an aid to reaching department goals is forgotten. This dominance of the negative aspects of discipline diminishes morale and officer productivity.

A First Step

A first step in approaching discipline positively is to rely more on emphasizing instruction and less on control. This requires the police executive to focus on organizational practices. He must first define the goals and objectives of all departmental units. He must then promulgate management's expectations to guide these units toward the realization of those goals. And finally, the police executive must establish a means to monitor performance and to correct improper actions.

This approach to management as it relates to discipline insures that all subordinates know and understand:

1. What must be done;

2. Why it must be done;

3. How it must be done;

4. When it must be done;

5. What constitutes satisfactory performance;

6. When and how to take corrective action.

To achieve this, management must establish workable procedures for documenting all expectations and advising individuals of their duties and responsibilities.

Prevention of Misconduct

Prevention is the primary means of reducing and controlling misconduct. While disciplinary actions are properly imposed on officers who engage in wrongdoing, they are of limited utility if they shield organizational conditions which permit the abuses to occur. Too often, inadequate training and lack of appropriate guidance are factors that contribute to officers' improper performance. The agency should make every effort to eliminate the organizational conditions which may foster, permit, or encourage improper performance of employees. In the furtherance of this objective, special emphasis is placed on the following areas:

Recruitment and selection. Selecting and appointing the highest quality of individuals to serve as law enforcement officers must be a priority of every law enforcement agency. During the selection process, psychological tests and individual interviews should be completed by each candidate in an attempt to identify those who would be best suited for police work. These procedures may also be used for promotional testing, as well as assignment to especially sensitive responsibilities or those that pose the greatest opportunities for abuse or wrongdoing.

This procedure must be governed by local policy and contracts.

Training. Recruit and in-service training for police officers should emphasize the sworn obligation of those officers to uphold the laws and provide for the public safety of the citizenry. Police ethics should be a major component in the training curricula, as well as an in-depth examination of the rules, regulations, policies and procedures of the department, including the disciplinary process. There must also be a process to advise veteran officers of any new statutory requirements or significant procedural changes.

Proper training of agency supervisors is critical to the discipline and performance of police officers. Emphasis should be placed on anticipating problems among officers before they result in improper performance or conduct. Supervisors are expected to recognize potentially troublesome officers, identify training needs of officers, and provide professional support in a consistent and fair manner.

Community outreach. Commanding officers should strive to remain informed about and sensitive to the needs and problems of the community. Regularly scheduled meetings with citizen advisory councils as well as informal contact with community leaders should be used to hear the concerns of citizens. These meetings help commanding officers identify potential crisis situations and keep channels of communication open between the agency and the community. The disciplinary process should be publicized and clearly explained in these forums.

Data collection and analysis. The Internal Affairs Unit or function should prepare periodic reports for the police executive that summarize the nature and disposition of all misconduct complaints received by the agency. This report shall be prepared at least quarterly, but may be prepared more often if needed. The report shall include the age, sex, race and other complainant characteristics which might signal systematic misconduct by any member of the department. Terminated complaints should be recorded and the reasons for termination explained. Copies of the internal affairs report shall be distributed to all command and supervisory personnel, the county prosecutor, as well as a designated representative of the collective bargaining unit.

An annual report summarizing the types of complaints received and the dispositions of the complaints shall be made available to the public. The names of complainants and accused officers shall not be published in this report.

Policy Management System
The department's policy management system serves as the foundation for effective discipline. A

clearly defined policy management system is designed to move the organization toward its stated goals and set the standard for acceptable performance. The system must incorporate a mechanism for the distribution of policies and procedures and provide for periodic review and revision as required. The system should include a classification and numbering system which facilitates cross-referencing where necessary.

Police departments should have a policy management system that includes at least the following:

1. Rules and regulations: A set of guidelines outlining the acceptable and unacceptable behavior of personnel. The rules and regulations shall be promulgated by the appropriate authority as designated by municipal ordinance.

2. Policies: Statements of agency principles that provide the basis for the development of procedures and directives.

3. Procedures: Written statements providing specific direction for performing agency activities. Procedures are implemented through policies and directives.

4. Directives: Documents detailing the performance of a specific activity or method of operation. Directives includes general orders, personnel orders, and special orders.

The policy management system should clearly and explicitly state management's intentions. The reader must understand what management wants to accomplish and what behavior is expected. Each category of documents in the policy management system should be issued in a distinctive, readily identifiable format.

Specific categories of misconduct that are subject to disciplinary action must be precisely defined within the department's rules and regulations. Any incident of inappropriate behavior may fall into one or more of the following categories:

CRIME: Complaint regarding the involvement in illegal behavior, such as bribery, theft, perjury or narcotics violations.

EXCESSIVE FORCE: Complaint regarding the use or threatened use of excessive force against a person.

ARREST: Complaint that the restraint of a person's liberty was improper or unjust.

ENTRY: Complaint that entry into a building or onto property was improper or that excessive force was used against property to gain entry.

SEARCH: Complaint that the search of a person or property was improper, unjustified or otherwise in violation of established police procedures.

DIFFERENTIAL TREATMENT: Complaint that the taking, failing to take, or method of police action was predicated upon irrelevant factors such as race, attire, age, or sex.

DEMEANOR: Complaint that a department member's bearing, gestures, language or other actions were inappropriate.

SERIOUS RULE INFRACTIONS: Complaint such as disrespect toward supervisor, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

MINOR RULE INFRACTIONS: Complaint such as untidiness, tardiness, faulty driving, or failure to follow procedures.

In addition, the rules and regulations shall clearly indicate the possible penalties an officer might receive when an allegation of misconduct is substantiated. A system of progressive discipline must be instituted within the department's rules. Progressive discipline serves an important role in the process by which the department deals with minor complaints of misconduct. In providing a range of penalties, the department can use the disciplinary process to achieve the basic goals of instruction and addressing inappropriate behavior before minor problems escalate into major problems. At the same time, the accused officer is made aware that repeated violations of department rules will lead to ever increasing penalties.

A progressive discipline can include:

1. Counseling
2. Oral reprimand or performance notice
3. Letter of reprimand
4. Loss of vacation time(1)
5. Imposition of extra duty1

6. Monetary fine(2)
7. Transfer/reassignment
8. Suspension without pay
9. Loss of promotion opportunity1
10. Demotion
11. Discharge from employment

The disciplinary process shall be thoroughly explained in department policy and procedure, including precise descriptions of the proper authority of the Internal Affairs Unit, the investigation process, the officer's rights, the hearing process and all appeal procedures available to the officer.

The rules and regulations which clearly describe and define categories of misconduct and the internal affairs policy and procedures shall be made available to all employees. In addition, a copy of the rules and regulations and a copy of the department's internal affairs policy and procedure shall be provided to a representative of any collective bargaining unit for employees.

Responsibility for Carrying Out Discipline

A system of rules and regulations specifying proper behavior will not in itself assure effective discipline. Unless there is some method of detecting violations of the rules, and bringing misconduct to the attention of the proper authorities, the written rules will have little meaning. If management fails to act promptly and appropriately when improper conduct has occurred, discipline and the agency's effectiveness will rapidly diminish. When not acted upon, violations of department rules, regulations, policies or procedures become the accepted practice making the written directives meaningless.

Authority to Discipline

Subject to the limitations set forth in N.J.S.A. 40A:14-147 et seq. and municipal ordinances, the police executive is vested with the authority and responsibility for all department discipline. Except for emergency suspensions, all disciplinary action must be approved by the police executive.

To carry out disciplinary tasks successfully, however, responsibility must be delegated by the police executive to individual units within the agency. Although the levels of authority vary

within the agency's hierarchy, the failure to carry out responsibilities at any level will contribute to the organization's ineffectiveness. The task of clearly delineating responsibility and authority is essential to effective discipline.

Every supervisor has a responsibility for knowing and following the procedures established by the organization to deal with employee performance which is contrary to expectations. If the supervisor fails to follow these procedures or avoids his responsibility, that supervisor is not conforming to expected behavior and must himself be subjected to some corrective action. Some supervisors occasionally need to be reminded that the fundamental responsibility for direction and control rests with the immediate supervisor at the execution or operations level, not with the police executive.

To provide such direction and control, supervisory personnel must be granted proper authority to carry out their responsibilities. In order to properly exercise this authority, supervisory personnel shall be fully familiar with applicable department rules and regulations. Individual supervisory personnel may be permitted to take certain disciplinary measures, subject to approval of the police executive. These measures include oral reprimand or performance notice, written reprimand, and written recommendations for other disciplinary actions. The extent of this authority must be clearly stated in the department's policy management system.

Internal Affairs Unit

The Internal Affairs Unit, or responsibility, shall be established in each law enforcement agency. Depending upon the need, the Internal Affairs function can be full or part-time. In any event, this function necessitates either the establishment of a unit or officer, or the clear definition of responsibility for carrying out the Internal Affairs function on an as needed basis. The unit shall consist of those members of the department assigned to the Internal Affairs function by the police executive. Personnel assigned to the Internal Affairs function serve at the pleasure of and are directly responsible to the police executive or designated Internal Affairs commander.

The goal of Internal Affairs is to insure that the integrity of the department is maintained through a system of internal discipline where fairness and justice are assured by objective, impartial investigation and review.

Duties and Responsibilities

The Internal Affairs Unit or officer shall conduct investigations of allegations of misconduct by members of the department and review the adjudication of minor complaints handled by supervisors. In addition, Internal Affairs shall be responsible for the coordination of investigations involving the discharge of firearms by department personnel. Internal Affairs will also be responsible for any other investigation as directed by the police executive.

Internal Affairs may conduct an internal affairs investigation on its own initiative upon notice to, or at the direction of the police executive or Internal Affairs commander. Internal Affairs may refer investigations to the employee's supervisor for action as permitted by department policy and procedures.

Internal Affairs members or officers temporarily assigned to that function should have the authority to interview any member of the department and to review any record or report of the department relative to their assignment. Requests from Internal Affairs personnel, in furtherance of their duties and responsibilities, shall be given full cooperation and compliance as though the requests came directly from the police executive.

The Internal Affairs Unit or officer designated by the chief executive shall maintain a comprehensive central file on all complaints received, whether investigated by Internal Affairs or assigned to the officer's supervisors for investigation and disposition. An Internal Affairs index file should be maintained which records the basic information on each case, including the accused officer, allegations, complainant, date received, Internal Affairs officer assigned, disposition and disposition date for each complaint.

Staff Inspections

While the primary responsibility for enforcing department policies rests with the line supervisors, management can not rely solely on those supervisors for the detection of violations. Administrators should know whether or not the plans of the organization are being implemented and carried out as intended. It is necessary for management to know if behavior is, in fact, consistent with rules and regulations, policies and procedures. The task of detecting such defects should be delegated to an Inspection Unit or function.

Large agencies might establish an Inspection Unit operating directly out of the office of the police executive . Small and medium size agencies can successfully accomplish this function by periodically assigning the inspection task to selected unit commanders. Individuals so assigned

must be of unquestioned integrity and hold sufficient rank to achieve the objectives of the inspection function.

Duties and Responsibilities

The inspection function should determine by actual on-site inspection whether the policies of management are being complied with by personnel at the operations level. This function is also responsible for reviewing and evaluating procedures. In addition, the inspection unit or function should evaluate the material resources of the department and their utilization. This includes but is not limited to motor vehicles, communications equipment, office machinery and supplies. The inspection function or unit should report any deficiencies to the police executive, as well as recommend any possible solutions and improvements.

Training

Just as the original meaning of discipline is instruction, police agencies should view "discipline problems" as possible "training problems." Inappropriate behavior on the part of an officer or group of officers should prompt supervisors to review past training and evaluate the need for future training. Perhaps a particular officer needs a refresher course in a certain subject. Or perhaps changes in the law, the police department, or even within the community have given rise to a need for some training never before given to the officer or department as a whole.

From line supervisors up to the police executive, the potential need for training should always be considered when officers exhibit inappropriate behavior. The question should be, "Could training have prevented this behavior, and can training prevent it from happening in the future?"

Training in this sense can be anything from informal counselling of an officer about a particular policy or procedure, through formal department-wide training. The department may also take advantage of other agencies, including police academies, prosecutor's office, Division of Criminal Justice, or other outside entities.

Citizen Complaints

Complaints from the public provide the police executive with invaluable feedback. These complaints, whether substantiated or not, increase awareness of actual or potential problems. The

police executive should view complaints from the public as a means of determining where the police department falls short of its intended goals. Similarly, complaints regarding officer behavior or allegations of misconduct can alert the police executive to problems which require disciplinary action or identify a need for additional training. The police executive must initiate a policy which provides that all citizen complaints are readily accepted and promptly and fully investigated.

A properly administered complaint review system serves both the special professional interests of the police and the general interests of the community. As a disciplinary device, it can promote and maintain standards of conduct among police officers by punishing -and thereby deterring- aberrant behavior. Just as important, it can provide satisfaction to those civilians who are adversely affected by misconduct. Harold Beral and Marcus Sisk, "The Administration of Complaints by Civilians Against the Police," Harvard Law Review, 77, No. 3, January 1964, p.500.

It is clearly in the interest of the police executive to initiate effective change in the administration of internal discipline. Otherwise, public or police employee groups, or court decisions in civil litigation, may force executives to follow a course other than the one they would have chosen, and thus diminish their control over their agency. National Advisory Commission on Justice Standards and Goals, Report on Police, (Washington, D.C. GPO), P. 470. Also see Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976).

Complaint Process

Pursuant to N.J.S.A. 40A:14-147, administrative charges must be filed within 45 days of the date the department obtains sufficient information to file charges against an officer.

Agencies operating under the purview of Title 11A must comply with New Jersey Department of Personnel Rules (N.J.A.C. 4A:1-1.1 et seq.). Appendix Q contains the time table used by Department of Personnel for disciplinary action. While these steps are mandatory for all Department of Personnel agencies, the time table provides a model that should be adopted by all law enforcement agencies. Every law enforcement agency shall have its entire disciplinary process specified in writing.

Accepting Reports Alleging Officer Misconduct

All complaints of officer misconduct shall be accepted from all persons who wish to file a complaint regardless of the hour or day of the week. This includes those from anonymous sources, juveniles and persons under arrest or in police custody. Internal Affairs personnel should accept complaints if available. If Internal Affairs is not available, supervisory personnel should accept reports of officer misconduct, and if no supervisory personnel are available, complaints should be accepted by any police officer. At no time should a complainant be told to return to file his report.

Citizens should be encouraged to submit their complaints in person as soon after the incident as possible. If the complainant cannot file the report in person, a department representative should visit the individual at his or her home, place of business or other location in order to complete the report.

The Internal Affairs officer, supervisor or other officer receiving the complaint will explain the department's disciplinary procedures to the person making the complaint. He should advise the complainant that they will be kept informed of the status of the complaint and its ultimate disposition. To best accomplish this, the department shall prepare a fact sheet for distribution to people who make complaints. This fact sheet should include information on the department's disciplinary process and what role the complainant can expect to play. In addition, the fact sheet shall advise the complainant that it is a criminal offense to provide statements which they do not believe to be true.

The supervisor or other officer receiving the complaint shall complete the appropriate internal affairs report form. The report form should have adequate instructions for proper completion. The officer accepting the report should then have the complainant sign the completed form.

If the complaint is anonymous, the officer accepting the complaint should complete as much of the internal affairs report form as he can given the information he has received.

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the supervisor or commander of the accused officer. All other complaints should be retained by or forwarded to the Internal Affairs Unit.

Complaints might also be received from other law enforcement agencies, such as neighboring municipal police agencies, the county prosecutor or the F.B.I. In such cases, the complaint should be forwarded to Internal Affairs for immediate handling.

If a complainant comes to a municipal police agency to make a complaint about another police agency, he should be referred to that agency. However, if the complainant expresses fear or concerns about making the complaint directly, he should be referred to the county prosecutor.

All complaints should be investigated, so long as the complaint contains sufficient factual information to warrant an investigation. In cases where the identity of the officer is unknown, the Internal Affairs investigator should use all available means to determine proper identification. Each complaint should be investigated to its logical conclusion.

Some very minor complaints are merely a misunderstanding on the part of the citizen. If the supervisor accepting the complaint can resolve it to the complainant's satisfaction through an explanation of department rules or procedures, the complaint process will be terminated. In these cases, the resolution shall be noted on the report form which should then be signed by the complainant and the officer involved, and filed with Internal Affairs.

Immediate Suspension Pending Investigation and Disposition

In cases involving allegations of serious officer misconduct, the police executive may choose to suspend the accused officer pending the outcome of the investigation and subsequent administrative charges, if any. Before immediate suspension of an officer, with or without pay, the police executive in all law enforcement agencies, whether or not they are regulated by the Department of Personnel, should determine if any of the following conditions warranting immediate suspension have been met.

1. The employee is unfit for duty.
2. The employee is a hazard to any person if permitted to remain on the job.
3. An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.
4. The employee has been formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job.

See Appendix Q for the use of immediate suspension in relation to the entire disciplinary time table.

In deciding whether or not to continue to pay an officer who has been suspended pending the outcome of the investigation or complaint, the police executive and appropriate authority shall consider the seriousness of the offense as well as the possible outcomes should the officer be

found guilty.

It should be clear that suspension of an officer before the completion of the investigation or disposition of the case is a serious matter. Such suspension may be immediately necessary, as in the case of an officer reporting for work under the influence of alcohol. In other cases, however, suspension might not be immediate but rather would follow a preliminary investigation into the matter which indicates one of the above criteria has been met. In any case, suspension prior to the disposition of the case must be clearly documented and justified. At the time of the suspension, the individual shall be provided with a written statement of the reasons the action has been taken. In the event of a refusal by the individual to accept that written statement, a copy shall be provided to the individual's collective bargaining representative as soon as possible. If the immediate suspension is imposed by a supervisor or commander authorized to do so, the chief executive must be advised without delay. He will then determine the status of the suspension given the facts of the case in light of the above criteria. In no case shall immediate suspension be used as a punitive measure.

Administrative Reassignment

In cases involving the use of force which results in death or serious bodily injury, there shall be a presumption in favor of administrative reassignment pending the outcome of the investigation, unless the officer is suspended as discussed above. Establishing a presumption in favor of administrative reassignment will ensure that officers who may have used unjustified force are removed from daily contact with the community. At the same time, such a policy will protect officers from disparate treatment and unjustified suspensions.

However, an inflexible rule governing the administrative reassignment of an officer under investigation would not be practical for departments or agencies of all sizes. Deciding whether or not to administratively reassign an officer under investigation requires consideration of factors such as the size of the department, the weight of the evidence against the officer, and community reaction to the incident. Until final disposition of the investigation or charges, the appropriate administrative status of an officer under investigation will turn on all of these factors.

Investigation and Adjudication of Minor Complaints

Complaints of differential treatment, demeanor and minor rule infractions should be forwarded to the accused officer's commanding officer. The commanding officer should require the officer's supervisor to investigate the allegation of misconduct.

Officers conducting the investigation of any allegation of misconduct must strive to conduct a thorough and objective investigation without violating the rights of the accused officer or any other police officer. Accordingly, all supervisors and any other officer who may be called upon to do an internal investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating internal complaints.

The supervisor investigating the complaint should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, or dispatcher forms. The supervisor should then submit a report to the commanding officer summarizing the matter and indicating the appropriate disposition. Possible dispositions include:

1. Exonerated: The alleged incident did occur, but the actions of the officer were justified, legal and proper.

2. Sustained: The investigation disclosed sufficient evidence to prove the allegation.

3. Not Sustained: The investigation failed to disclose sufficient evidence to clearly prove or disprove the allegation.

4. Unfounded:
a. The alleged incident did not occur; or
b. There is insufficient information to conduct a meaningful investigation.

If the supervisor determines that the complaint to have a disposition of unfounded, exonerated or not sustained, and the commanding officer concurs, the investigation report is to be forwarded to Internal Affairs for review and entry in the index file and filing. The subject officer shall be notified in writing of the outcome of the investigation.

If the complaint is sustained, the commanding officer should determine the appropriate disciplinary action. If the action is no more than a written reprimand, a summary of the complaint and notification of the disciplinary action taken should be forwarded to Internal Affairs. If, however, the commander determines that the matter is of a more serious nature it should be forwarded to Internal Affairs for further investigation.

When an oral reprimand or performance notice is given, the officer or employee shall be advised that the supervisor or superior officer is giving an oral reprimand. The supervisor shall complete

an oral reprimand report (a necessary record for progressive discipline) or performance notice and forward it to the commander. A copy shall also be given to the officer being disciplined.

Upon approving the oral reprimand or performance notice, the commanding officer will forward the report to be placed in the officer's or employee's personnel file. Six months after the date of the approved oral reprimand or performance notice, the disciplinary report shall be removed from the file and destroyed, provided no other breach of discipline has occurred. The subject officer shall be notified in writing that the oral reprimand or performance notice has been purged.

When a written reprimand is given, the supervisor or commanding officer giving such reprimand shall advise the subject officer of such and complete a written reprimand report. A copy of the written reprimand report is to be provided to or retained by the officer's supervisor and one copy of the report is to be provided to the officer or employee being disciplined. The original report, together with any supporting documentation, should be provided to the commanding officer for review.

The commanding officer should review the report and, in writing, either approve or disapprove the report. If disapproved, the commanding officer should direct what action, if any, be taken. Upon final approval, the report shall be forwarded to the Internal Affairs Unit and permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation.

Investigation and Adjudication of Serious Complaints

Where preliminary investigation indicates the possibility of a criminal act on the part of the accused officer, or the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor must be notified immediately. No further action should be taken, including the filing of charges against the officer, until directed by the county prosecutor.

All serious complaints shall be forwarded to the Internal Affairs Unit. This includes complaints of criminal activity, excessive force, improper or unjust arrest, improper or excessive entry, improper or unjustified search, serious complaints of differential treatment or demeanor, serious rule infractions, and repeated minor rule infractions.

The supervisor or commanding officer initiating such action shall complete a form recommending an internal affairs investigation. This form, together with any supporting documentation, should be forwarded through the chain of command to the Internal Affairs Unit. Where there is no full-time Internal Affairs Unit or function the report is forwarded to the police executive.

The Internal Affairs commander or police executive will direct such further investigation by the supervisor, commanding officer or Internal Affairs as deemed appropriate. Officers conducting these investigations must strive to conduct a thorough and objective investigation without violating the rights of the accused officer or any other police officer. Internal affairs officers and any other officer who may be called upon to do an internal investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating internal complaints.

Internal Affairs shall serve the suspect officer with notification of the Internal Affairs investigation, unless the nature of the investigation requires secrecy. The Internal Affairs investigator should interview the complainant, all witnesses and the accused officer, as well as review relevant reports, activity sheets, and dispatcher forms and obtain necessary information and materials.

Upon completion of the investigation, the Internal Affairs Unit will recommend dispositions for each allegation through the chain of command to the police executive. As previously described, these dispositions may include exonerated, sustained, not sustained, or unfounded. Each level of review may provide written recommendations and comment for consideration by the police executive.

The police executive, upon reviewing the report, supporting documentation and information gathered during any supplemental investigation, shall direct whatever action is deemed appropriate. If the complaint is unfounded or not sustained, or the subject officer is exonerated, the investigation report shall be entered in the index file and filed. Internal Affairs shall notify the subject officer in writing of the disposition.

If the complaint is substantiated and it is determined that formal charges should be preferred, the police executive will direct either the commanding officer, supervisor or Internal Affairs to prepare, sign, and serve charges upon the accused officer or employee. The individual assigned shall prepare the formal notice of charges and hearing on the Charging Form. (See sample Charging Form in Appendix F.) This form will also be served upon the officer charged in accordance with N.J.S.A. 40A:14-147 et seq.

The notice of charges and hearing shall direct that the officer charged must enter a plea of guilty or not guilty, in writing, on or before the date set forth in the notice for entry of plea. The date for entry of plea shall be at least five days after the date of service of the charges. If the officer charged enters a plea of guilty, the police executive officer shall permit the officer to present factors in mitigation prior to assessing a penalty. Conclusions of fact and the penalty imposed will be noted in the officer's personnel file after he has been given an opportunity to read and sign it. Internal Affairs will cause the penalty to be carried out and complete all required forms.

If the accused officer makes a written request for a hearing, the police executive will set the date for the hearing as provided by statute and arrange for the hearing of the charges. Internal Affairs shall be responsible for or assist the assigned commander or prosecutor in the preparation of the department's prosecution of the charges. This includes proper notification of all witnesses and preparing all documentary and physical evidence for presentation at the hearing.

The hearing shall be held before the appropriate authority or the appropriate authority's designee. The hearing authority should be empowered to sustain, modify in whole or in part, or dismiss the charges stated in the complaint. The decision of the hearing authority must be in writing and should be accompanied by findings of fact for each issue in the case.

If the hearing authority finds the complaint against the officer is substantiated, he should fix any of the progressive penalties which he deems appropriate under the circumstances within the limitations of statute and the department's policy management system.

A copy of the decision and accompanying findings and conclusions shall be delivered to the officer or employee who was the subject of the hearing and to the police executive if he was not the hearing authority. Upon completion of the hearing, Internal Affairs will complete all required forms (Department of Personnel jurisdictions use the Final Notice of Disciplinary Action form DPF-31B) including the entry of the disposition in the index file. If the charges were sustained Internal Affairs will cause the penalty to be carried out. The report shall be permanently placed in the officer's or employee's personnel file.

Upon final disposition of the complaint, a letter should be sent to the complainant explaining the outcome of the investigation.

Confidentiality

The progress of internal affairs investigations and all supporting materials are considered confidential information. The contents of the internal investigation case files will be retained in

the Internal Affairs Unit and clearly marked as confidential. Only the police executive or his designee is empowered to release publicly the dispositions of an internal investigation or disciplinary action. In addition, the subject officer may authorize the release of copies of formal disciplinary charges and their outcome to any third party.

All disciplinary hearings shall be closed to the public unless the accused officer requests an open hearing.

Record Keeping

Due to the sensitive nature of internal affairs records, it is necessary to design specific security measures to insure the confidentiality of these records.

Internal Affairs Records

Internal affairs personnel shall maintain a filing system accessible only to unit members and the chief. Other personnel may be given access based on a specific need, such as a deputy chief in the chief's absence. The list of those authorized to access these files must be kept to a minimum. Access to these records must be specifically addressed with department policy and procedures. Physical security measures also should be taken. Depending on the police department, this could include securely locked filing cabinets in secured offices. If a police department uses computers to maintain internal affairs records of any kind, special security measures must be taken. A stand alone personal computer is the most secure system to limit unauthorized access to internal affair records.

Internal affairs index file. The purpose of internal affairs index file is to serve as a record control device. It will serve as an inventory of internal affairs case files and provide an overview of case status to authorized personnel. The instrument used for such an index file will vary by police department and could include a log book or computerized data base.

All internal affairs complaints shall be recorded in the index file. Entries should record the basic information on each case, including the accused officer, allegations, complainant, date received, Internal Affairs officer assigned, disposition and disposition date for each complaint. A unique case number assigned to each internal affairs complaint will locate the complete investigation file and simplify case tracking.

Investigation files. An internal affairs investigation file is needed for all internal affairs reports. Given the wide range of internal affairs reports received by a police department, these investigation files could consist of only the initial report form and the appropriate disposition document. On the other hand, investigation files could include extensive documentation of an investigation. The internal affairs investigation file should contain the entire work product of the internal affairs investigation, regardless of the author. This would include investigators' reports, transcripts of statements, and copies of documents relevant to the investigation. The file also should include all references to other department records as may be applicable. For instance, if an allegation is made of excessive force during an arrest, the internal affairs investigation file should contain copies of the reports from the arrest.

In those cases where an internal affairs investigation results in the filing of criminal charges, the prosecutor's office should review the entire internal affairs investigation file. It will be their responsibility to decide which items are admissible and which are discoverable. In these cases, the department must follow the instructions of the county prosecutor.

Retention schedule. Internal affairs investigation records are not specified as such by the New Jersey Department of State, Division of Archives and Records Management in the "Records Retention and Disposition Schedule for Local Police Departments" (revised 12/20/91). Of course, if criminal action arises out of an internal affairs investigation, the internal affairs investigation records must be maintained according to the provisions for criminal records.

Under the current "Records Retention and Disposition Schedule," non-criminal internal affairs reports and the respective investigation files are considered "Special Reports" (0075-0000). As such, these records must be maintained for a minimum of five years. An exception to that rule, documents relating to anonymous reports of non-criminal incidents that are unfounded are considered "Non-criminal incident report files" (0036-0003) and must be maintained for at least two years.

The records of any internal affairs complaint that has a disposition of exonerated, unfounded, or not sustained shall not be used in any fashion to effect progressive discipline. In addition, such records shall not in any way impact any condition of employment, including promotions.

Personnel Records

Personnel records are separate and distinct from internal affairs investigation records. Internal affairs investigation reports shall never be placed in personnel records. When a complaint has a disposition of exonerated, not sustained, or unfounded, there shall be no indication in the employee's personnel file that a complaint was ever made.

In those cases where a complaint is sustained, the only items to go into the employee's personnel file will be a copy of the internal affairs charge form and a copy of the disposition form. No part of the internal affairs investigation report shall be placed in the personnel file.

Conclusion

A clear and comprehensive policy management system delineating the procedures for dealing with allegations of officer misconduct or the improper delivery of police services, and its uniform application, bolsters the integrity of the police department. A responsive and consistent Internal Affairs Unit or officer is an indispensable part of the police administrative process. Its clear existence in the organizational structure gives notice to both the public and employee that the police agency is willing to "police the police."
PART TWO

INTERNAL AFFAIRS INVESTIGATIONS

Selection of Personnel for the Internal Affairs Function

Internal affairs investigations must be considered as important to the community and department as any criminal investigation. An internal investigation may follow one of two divergent tracks or both simultaneously. These are the administrative proceedings track which may result in employment sanctions and the criminal prosecution track which may result in criminal sanctions. Each track may have different standards of proof. What may be admissible for one may not necessarily be admissible for the other.

Consequently, it is important that the Internal Affairs investigator be familiar with proper investigative techniques and legal standards for each type of proceeding. This is necessary so that evidence obtained will be admissible in the proper tribunal and the rights of the officer under investigation will not be inadvertently violated. Therefore, it is essential that experienced investigators be assigned to internal affairs investigations. They must be trained not only in the elements of criminal law, court procedures, rules of evidence and use of technical equipment, but also in the disciplinary and administrative law process. Each investigator must be skilled in interviewing and interrogation, observation, surveillance and report writing.

Personnel assigned to conduct internal affairs investigations should be energetic, resourceful and alert. They must have a keen memory and display a high degree of perseverance and initiative. The Internal Affairs investigator must hold the police responsibility to the community and professional commitment above personal and group loyalties. Internal Affairs personnel must be of unquestioned integrity and possess the moral stamina to perform unpopular tasks. It is important that these investigators possess the ability to withstand the rigors and tensions associated with complex investigations, social pressures and long hours of work. The investigator must possess the ability to be tactful and diplomatic when dealing with members of the department and the community. Finally, it is recommended that personnel assigned to the Internal Affairs function reflect the racial and ethnic spectrum within the community. This is helpful in gaining acceptance by and assuring access to all segments of the community.

However, law enforcement executives shall not assign any person charged with representation of members of the collective bargaining unit to the internal affairs function. The conflict of interest if such an assignment were made would be detrimental to the internal affairs function, the accused officer, the officer so assigned and the department as a whole.

Investigation Standards

The most critical aspect of the disciplinary process is the investigation of an allegation of police misconduct. Only after a complete, diligent and impartial investigation can a good faith decision be made as to the proper disposition of the complaint. Decisions based upon such an investigation will support the credibility of the department among its ranks as well as the public at large.

As with all other investigations, lawful procedures must be used to gather all evidence pertaining to allegations against a police officer. Investigations for internal disciplinary or administrative purposes involve fewer legal restrictions than criminal investigations. Restrictions that do exist, however, must be recognized and followed. Failure to do so may result in improperly gathered evidence being overturned during the appeal process. Restrictions which apply to internal investigations may have their basis in case law, collective bargaining agreements, local ordinances, administrative regulations, Department of Personnel rules or municipal personnel department rules. Internal affairs investigators shall familiarize themselves with all of the above provisions.

Complaints must be professionally, objectively and expeditiously investigated in order to gather all information necessary to arrive at a proper disposition. It is important to document citizens' concerns, even those which might appear to be unfounded or frivolous. If such complaints are not

documented or handled appropriately, citizen dissatisfaction will grow, fostering a general impression of department wide insensitivity to citizens' concerns.

By statute (N.J.S.A. 40A:14-147), administrative charges must be filed within 45 days of the date the department has developed sufficient information to file such charges against an officer. In cases involving criminal activity, the forty-five day time period does not start until the final disposition of any criminal proceedings arising out of the incident against the accused officer. Investigation status reports should be prepared every seven days for review by the police executive or Internal Affairs supervisor. A 30-day time period in which to complete the investigation is recommended. Requests for an extension of time to complete an investigation should be submitted in writing. The request should state the reasons which necessitate the extension. Only the police executive, or the officer designated by him to direct the Internal Affairs function, should be authorized to grant an extension.

The filing of legitimate complaints pertaining to department personnel is to be encouraged as a means of holding those personnel accountable to the public. However, the department must simultaneously seek to hold members of the public responsible for the filing of false and malicious complaints. In such cases, complainants shall be informed that legal proceedings may be instituted against them to rectify such deliberate actions.

Investigation Techniques

The investigator assigned an internal investigations case should initially outline the case to determine the best investigative approach and identify those interviews immediately necessary. The investigator should determine if any pending court action or ongoing criminal investigations might delay or impact upon the case at hand. If it appears that the conduct under investigation may have violated the law, or the investigation involves the use of force by the officer which results in serious bodily injury or death, the county prosecutor shall be immediately notified of the internal affairs investigation.

If the investigation involves a criminal filing against the complainant, wherein the accused officer is the victim of the offense charged, an initial interview should be conducted with the complainant. However, absent extenuating circumstances, no further contact should be made until charges against the complainant are adjudicated.

The Internal Affairs investigator may use any lawful investigative techniques including inspecting public records, questioning witnesses, interviewing the subject officer, questioning

fellow employees, and surveillance. Therefore, the investigator must understand the use and limitations of such techniques.

As in any criminal investigation, the following necessary materials, if available, should be obtained: physical evidence, statements or interviews of all witnesses, statements or interviews of all parties of specialized interest (such as doctors, employers, teachers, parents, etc.); all relevant documents, records and reports, activity sheets, complaint cards and radio logs. Special attention should be given to securing records which are routinely disposed of such as telephone and radio transmissions routinely recorded on department taping equipment. In addition, the investigator should check the record bureau files to determine if the subject, complainant, or witnesses have any prior police involvement.

It is generally recommended that the complainant and other lay witnesses be interviewed prior to interviewing sworn members of the department. This will often eliminate the need for having to do second and third interviews with departmental members. However, this procedure does not have to be strictly adhered to if circumstances and the nature of the investigation dictate otherwise.

While the Sixth Amendment right to counsel does not extend to internal investigations, an officer shall be permitted to obtain an attorney if so desired. The Sixth Amendment applies to a criminal prosecution or to a proceeding which threatens a person's liberty. See Middendorf v. Henry, 425 U.S. 25, 34, 95 S.Ct. 1287, 47 L.Ed. 2d 556 (1976). However, a department must permit an employee to have a union representative present at an investigative interview if the employee requests representation and the employee reasonably believes the interview may result in disciplinary action. N.L.R.B. v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975). In addition, collective bargaining agreements may provide additional criteria for permitting a subject officer to have representation.

Where an internal affairs investigation takes the criminal prosecution track, it is important that the employee be made aware of his or her constitutional rights.

Interviewing the Complainant

The complainant should be personally interviewed if circumstances permit. If the complainant cannot travel to the investigator's office, the investigator should conduct the interview at the complainant's home or place of employment. All relevant identifying information concerning the complainant should be recorded, e.g., name, complete address (street, apartment number, city, state), telephone number and area code, race or ethnic identity, sex, date of birth, hair color, eye color, social security number, FBI and SBI numbers, and place of employment (name and

address).

All relevant facts known to the complainant should be obtained during the interview. Once the interview is completed, an effort should be made to obtain a formal, sworn statement from the complainant. Depending upon the circumstances, such as a hospitalized complainant, taped statements may be considered in place of the sworn statement.

Witness Interviews

Whenever possible, all witnesses to the matter under investigation should be personally interviewed and formal statements taken. The investigator should attempt to determine if the witness is motivated by prior arrests, a personal relationship with the complainant or member of the department, or other significant factors.

Reports, Records and Other Documents

All relevant reports should be obtained and preserved as expeditiously as possible.

Internal department reports relating to an accused officer's duties should be examined. Examples of such reports are: arrest reports and investigation reports, radio logs, patrol logs, vehicle logs and evidence logs pertaining to or completed by the officer.
Records and documents of any other agency or organization that could prove helpful in the investigation should be examined. These may include: reports from other police departments, hospital records, doctors' reports, jail records, court transcripts, FBI or SBI records, credit bureau records, corporate information (Secretary of State's Office), specialized licenses (real estate, insurance, medical), motor vehicle abstracts and telephone toll analysis. In some instances, subpoenas or search warrants may be necessary to obtain the information.

Physical Evidence

Investigators should obtain all relevant physical evidence. All evidence, such as clothing, hair or fabric fibers, stains, and weapons should be handled according to established evidence procedures.

With respect to radio tapes, the original tape is the best evidence and should be secured at the outset of the investigation. Transcripts or copies of the original recordings can be used as

investigative leads. Tapes should be monitored to reveal the totality of the circumstances.

Photographs

In the event of a complaint involving excessive use of force, the following photographic documentation should be obtained when appropriate. Whenever possible, color photography should be used.

1. Photographs of the complainant at the time of arrest or following the alleged incident of excessive force.
2. Photographs of the subject officer in the event that officer was a victim.

3. A recent photo of the officer in the event a photo spread will be used for identification purposes. The photo spread must be properly retained for possible evidentiary purposes.

4. Photographs of the scene of the alleged incident, if necessary.

Physical Tests

Police officers who are the subjects of internal investigations may be compelled to submit to various physical tests or procedures to gather evidence. Such evidence may be used against them in a disciplinary proceeding.

Evidence Rule 25 (a) states that "..no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition.." Evidence that may be obtained or procedures that may be used to obtain evidence under this rule include:

1. Breath sample
2. Blood sample
3. Requiring suspect to speak
4. Voice recordings
5. Participation in a suspect lineup
6. Handwriting samples
7. Hair and saliva samples

Generally, a person cannot be physically forced to produce this evidence or submit to such tests, although a court order may be obtained to legally compel him to do so. Refusal to comply with the order can result in a contempt of court action, and may also result in a second disciplinary

action for failure to comply with a lawful court order.

Polygraph

While a police officer who is the subject of an internal investigation may request a polygraph examination, an employer shall not influence, request or require an employee to take or submit to a lie detector test as a condition of employment or continued employment (N.J.S.A. 2C:40A-1).

An officer cannot be required to submit to a polygraph test on pain of dismissal.
Engel v. Township of Woodbridge, 124 N.J. Super. 307 (App. Div. 1973).

If a polygraph is used the test must be administered by a qualified police polygraph operator.

Search and Seizure

As a general rule, the Fourth Amendment applies to any action taken by government. Police officers have the right, under the Fourth Amendment, to be free from unreasonable searches and seizures. Fourth Amendment warrant requirements apply to any search of an officer's personal property including clothing, car, home or other belongings.

A voluntary consent to a search may preclude some Fourth Amendment problems from developing. A consent search eliminates the need to determine what threshold standard must be met before conducting the search or seizure, either for an administrative or criminal investigation. Under New Jersey law, for consent to be legally valid, a person must be informed that he or she has the right to refuse to permit a search. State v. Johnson, 68 N.J. 349 (1975). If a consent search is utilized, the Internal Affairs investigator shall follow standard police procedures and have the subject officer sign a consent form after being advised of the right to refuse such a search.

In a criminal investigation the standard to obtain a search warrant is probable cause. Generally, a search warrant should be sought to search an area belonging to the subject officer when the officer can reasonably expect to maintain a high level of privacy in that area. Areas and objects in this category include the officer's home, personal car, bank accounts, safety deposit boxes, etc.

Generally, during either administrative investigations or criminal investigations, workplace areas may be searched without a search warrant. The critical question is whether the public employee

has a reasonable expectation of privacy in the area or property the Internal Affairs investigator wants to search. The determination of a reasonable expectation of privacy must be decided on a case by case basis. There are some areas in the person's workplace where this privacy expectation can exist just as there are some areas where no such expectation exists. Areas where supervisors or other employees may share or go to utilize files or equipment would present no expectation or diminished expectation of privacy. Included here would be government provided vehicles (patrol cars), filing cabinets, etc.

If a department intends to retain the right to search property which it assigns to officers for their use, including lockers, it should put officers on notice of that fact. This notification will help defeat an assertion of an expectation of privacy in the assigned property by the officer. The agency should issue a directive regarding this matter, as well as include the notice in any employee handbook or personnel manual (including the rules and regulations manual) provided by the department. The notice should also be posted in the locker area and on any bulletin boards. The following is a sample of what the notice should contain:

The department may assign to its members and employees departmentally owned vehicles, lockers, desks, cabinets, etc., for the mutual convenience of the department and its personnel. Such equipment is and remains the property of the department. Personnel are reminded that storage of personal items in this property is at the employee's own risk. This property is subject to entry and inspection without notice.

In addition, if the department permits officers to use personally owned locks on assigned lockers and other property, it should be conditioned on the officer providing the department with a duplicate key or the lock combination, whichever is applicable.

At the present time, the law is unclear on the use in a subsequent criminal prosecution of evidence obtained during a warrantless administrative search or inspection of department property. It is therefore advisable to obtain a warrant whenever there exists probable cause to believe that the department property to be searched contains contraband or evidence of a crime.

Any search of departmental or personal property should be conducted in the presence of the subject officer and a property control officer.

Eavesdropping

In accordance with N.J.S.A. 2A:156A-4b, law enforcement non-third party intercepts can be used during internal affairs investigations. Pursuant to that section of the New Jersey Wiretap Act, a

law enforcement officer may intercept and record a wire or oral communication using a body transmitter if that officer is a party to the communication or where another officer who is a party to the communication requests or requires that such interception be made. Procedures for such recordings are dictated by individual departmental or agency policy.

There is no prohibition against the monitoring of phones used exclusively for departmental business if an agency can demonstrate a regulatory scheme or a specific office practice, of which employees have knowledge. In such instances, there may be a diminished expectation of privacy in the use of these telephones and monitoring would be acceptable.

Lineups

A police officer may be ordered to stand in a lineup to be viewed by witnesses or complainants. There is no need for probable cause and the officer may be disciplined for refusal. In Biehunik v. Felicetta, 441 F.2d 228 (2d Cir. 1971) cert. den. 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed. 2d 711 (1971), the court upheld a police department's order to 62 police officers to appear in a lineup for possible identification by citizens alleging they had been assaulted by city police officers. The department did not have probable cause nor a search warrant for this action. The officers had been advised that they faced criminal prosecution as well as administrative sanctions. The court applied the following test to the department's order:

Whether upon a balance of public and individual interests, the order...was reasonable under the particular circumstances, even though unsupported by probable cause [Id. at 203].

The Biehunik holding was cited as support of a court ruling that a police department could expose a police officer's hands, uniform and wallet to a "blacklight" to determine whether he was involved in criminal activity. Los Angeles Police Protective League v. Gates, 579 F.Supp. 36 (C.D. Calif. 1984).

The lineup must be constructed so as not to be unfairly suggestive. The same rule applies to photo arrays.

Other Investigative Tools

The law regarding the use of most other investigative tools is the same for internal investigations as for criminal investigations. Constitutional precepts such as due process and right to privacy apply to investigative methods utilized in both administrative and criminal investigations. It must

be considered, however, that even those constitutionally permissible methods may be restricted or prohibited by ordinance, department rule, or contract.

Interviewing Members of the Department

Interviews of fellow police officers are critical to the internal investigation process and must be carefully thought out and well planned. When interviewing a police officer as a witness, he must be made aware of the differences between a witness and the subject of the investigation, and advised that he is not the subject of the investigation at this time. If, at any time, the officer becomes a subject of the investigation, he shall be apprised of that fact and sign an acknowledgment form.

Interviewing the Subject Officer

Whenever there is a possibility that the investigation may result in criminal prosecution of the officer or that the county prosecutor may be conducting a separate investigation, the internal affairs investigator should consult with the county prosecutor prior to interviewing the officer.

A public employer may demand that an employee answer questions specifically, directly, and narrowly related to the performance of his official duties, on pain of dismissal, without requiring him to waive his constitutional right against self-incrimination. However, if the employer offers the employee the choice between giving incriminating answers or losing his job, that choice makes any answer compelled in violation of the Fifth Amendment. As a result, the answer cannot be used in a subsequent criminal proceeding. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), Uniformed Sanitation Men Association v. Commission of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). An employer cannot force an employee to choose between surrendering a constitutional right or his job.

An employer can dismiss an employee for refusing to answer questions where the employee is granted use immunity(3) for his answers and the possibility of self-incrimination is thus removed. Once use immunity has been granted, as a prerequisite to the imposition of discipline for refusal to answer, the employee must be clearly, unambiguously, and expressly advised of the grant of use immunity and of the possible imposition of discipline, including dismissal, for a refusal to answer. Silence can be the basis for a misconduct charge only when there has been a

prior explanation of the use immunity to which the employee's statements are entitled. Banca v. Phillipsburg, 181 N.J.Super. 109 (App. Div. 1981).

A public employee has a duty to appear and testify, under pain of removal from office, before any court, grand jury, or the State Commission of Investigation, on matters directly related to the performance of his duties. N.J.S.A. 2A:81-17.2a1. If the employee claims the privilege against self-incrimination after having been informed that his failure to appear and testify would result in removal from office, N.J.S.A. 2A:81-17.2a2 confers use immunity on the testimony and any evidence derived from it, except where the employee is subsequently prosecuted for perjury or false swearing while testifying. This is a self-executing legislative grant of immunity. State v. Gregorio, 142 N.J.Super. 372 (Law Div. 1976). This statute has been held to apply to a departmental/internal investigation to the extent that an employee under investigation is entitled to be clearly, unambiguously, and expressly advised of the grant of use immunity at the outset as a prerequisite to the subsequent imposition of discipline for refusal to answer questions. He is further required to be told that refusal to answer could subject him to that discipline. Banca v. Phillipsburg, 181 N.J.Super. 109 (App. Div. 1981). During a departmental investigation, where an employee is granted use immunity and still refuses to answer questions, the employer's sole recourse to compel a response is to impose discipline. The employer cannot resort to any special court proceeding. In re Toth, 175 N.J.Super. 254 (App. Div. 1980).

Depending upon the circumstances and nature of the complaint, the subject officer may be required to either submit a report detailing his understanding and knowledge of the relevant facts of the investigation or provide a formal statement. As with an officer's statements, an officer required to submit a report has a right not to incriminate himself in a criminal matter. The officer must exercise this right to remain silent. If he waives this right, any report he submits in writing can be used against him in subsequent criminal proceedings.

However, an officer does not have the right to refuse to submit a report on the grounds that the report may reveal a violation of a department policy, rule, or regulation that is not a criminal offense. The officer may be subject to departmental discipline for refusal to submit a report that would not implicate him in a criminal offense.

Interviews shall take place at the Internal Affairs office or a reasonable and appropriate location designated by the investigating officer. The subject officer's superior shall be made aware of the time and place of the interview so the officer's whereabouts are known. Interviews shall be conducted at a reasonable hour when the officer is on duty, unless the seriousness of the matter requires otherwise.

Prior to the commencement of any questioning, the officer shall be advised of the following:

1. You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. This investigation concerns (the matter under investigation).

2. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.

3. You have the right to refuse to answer any questions or make any statements that might incriminate you in a criminal matter.

4. If you fail to exercise this right, anything you say may be used against you in a criminal proceeding.

5. The right to refuse to answer a question on the grounds of your right against self-incrimination does not include the right to refuse to answer on the grounds that your answer may reveal a violation of a department policy, rule, or regulation that is not a criminal offense.

6. You may be subject to departmental discipline for refusal to give an answer that would not implicate you in a criminal offense.

7. Anything that you say may be used against you not only in any subsequent department charges, but also in any subsequent criminal proceeding.

8. You have the right to consult with a representative of your collective bargaining unit, or another representative of your choice, and have them present during the interview.

This information shall be contained in a form which the subject officer signs and which signature is witnessed. See the sample form in Appendix H.

The employee shall be informed of the name and rank of the interviewing investigator and all others present during the interview. The interview can then begin. The questioning must be conducted in an orderly, non-coercive manner, without threat of punitive action or promise of reward. The questioning session must be of reasonable duration, taking into consideration the complexity and gravity of the subject matter of the investigation. The officer must be allowed time for meal breaks and to attend to personal physical necessities.

The department may make an audio or video recording of the interview. A transcript or copy of the recording shall be made available to the officer as soon as possible upon request, at his expense.

Any questions asked of officers during an internal investigation must be "narrowly and directly" related to the performance of their duties and the ongoing investigation. Gardner v Broderick, 393 U.S. 273 (1968). Officers do not have the right to refuse to answer questions directly and narrowly related to the performance of their duties. All answers must be fully and truthfully given. However, officers cannot be forced to answer questions having little to do with their performance as police officers or unrelated to the investigation.

Unless the officer specifically waives his Fifth Amendment rights, any incriminating statements obtained under direct order will not be admissible in a criminal prosecution, however, they will be admissible in an administrative hearing.

If during the course of an internal investigative interview an officer refuses to answer any questions specifically directed and narrowly related to the performance of duty and fitness for office on the grounds that he may incriminate himself, and if the department deems that in order to properly conduct its investigation it must have the answers to those specific questions, the department should then contact the county prosecutor to obtain use immunity for the answers to the questions. Upon obtaining a written grant of immunity, the department shall advise the subject officer of the following:

1. You are being questioned as part of an official investigation of this agency into potential violations of department rules and regulations. This investigation concerns (the matter under investigation).

2. You will be asked questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.

3. You have the right to refuse to answer any questions or make any statements that might incriminate you in a criminal matter.

4. The right to refuse to answer a question on the grounds of your right against self-incrimination does not include the right to refuse to answer on the grounds that your answer may reveal a violation of a department policy, rule, or regulation that is not a criminal offense.

5. You have invoked your right to remain silent and not to incriminate yourself.

6. You have been granted immunity from criminal prosecution in the event your answers to the narrow questions asked implicate you in a criminal offense. No answer given by you, nor evidence derived from the answer, may be used against you in any criminal proceeding.

7. You must now answer questions specifically directed and narrowly related to the performance of your official duties and your fitness for office.

8. If you refuse to answer, you may be subject to disciplinary charges for that refusal which can result in your dismissal from this agency.

9. Anything that you say may be used against you in any subsequent department charges.

10. You have the right to consult with a representative of your collective bargaining unit, or another representative of your choice, and have them present during the interview.

This information shall be contained in a form which the subject officer signs and which signature is witnessed. See the sample form in Appendix I.

The department shall permit officers who have been informed that they are a subject of an internal investigation to consult with counsel or anyone else prior to being questioned about matters concerning their continuing fitness for police service or matters concerning a serious violation of rules and regulations. Such counsel must be sought within a reasonable period of time, without causing the investigation to be unduly delayed. As a general rule, an officer shall be allowed at least two hours to consult with counsel or other representative of his choice.

No constitutional right to counsel exists during an internal administrative interview; therefore, in the absence of contract provisions or personnel rules providing otherwise, an officer has no right to have counsel present unless a criminal prosecution is contemplated. However, if it appears that the presence of counsel or another police officer requested by the subject will not disrupt the investigation, there is no reason to prevent their presence as observers. If the investigation involves criminal allegations, it may be inappropriate to allow a union representative to be present. However, in such instances the subject officer shall be allowed to consult with a union representative or an attorney if he so desires. In any case, the representative cannot interfere with the interview.
If the representative is disruptive or interferes, the investigator can discontinue the interview,

documenting the reasons the interview was ended. The investigator must be in control of the interview and cannot allow the representative or subject to take control. It should be made clear that by allowing a representative during a specific interview, the department is not adopting a general policy to permit counsel during other internal investigation interviews. This clarification must be made because if a subject officer is denied the opportunity to have a representative present, this decision may be deemed arbitrary and unfair.

At the conclusion of the interview, the investigator shall review with the subject officer all the information furnished during the interview. This should be done to alleviate any misunderstandings or misinterpretations and to prevent any controversies during a later hearing or trial.

The Officer as a Subject of a Criminal Investigation

Throughout any internal investigation, it is necessary to determine whether the allegations and evidence warrant criminal prosecution of the officer. If it appears that a criminal charge may be warranted, the county prosecutor must be notified immediately. Pursuant to his instructions, the investigation may then proceed. The investigation must adhere to all of the restrictions of a normal criminal investigation. The Miranda warning must be given and a waiver signed prior to any questioning of the accused officer. Search and seizure restrictions and constitutional safeguards must be applied.

The Internal Affairs Report and Conclusion of Fact

At the conclusion of the internal affairs investigation, the investigator will submit a written summary report which should consider all relevant documents, evidence, and testimony in order to determine exactly what happened. A complete account of the situation and any gaps or conflicts in evidence or testimony must be noted. The following should be included in the report:

1. Statement of allegations made by the complainant.
2. Statement of the situation as described by the officer involved.

3. Description of the facts and issues to which the complainant and police officer agree.

4. Description of the issues and allegations to which the complainant and police officer disagree.

5. Evidence which supports or refutes any facts, issues or allegations made.

6. Reference to any pertinent attachments and a synopsis of the attachments.

7. Summarized statements and interviews of witnesses arranged sequentially in terms of time and significance.
8. List of the evidence obtained, its relevance, and its relationship to statements and interviews.

9. Background information on persons named in the report in order to demonstrate their character and credibility (e.g., S.B.I. or F.B.I. records, intelligence information, etc.)

The report must contain a conclusion of fact for each allegation of misconduct. The conclusion of fact should be recorded as exonerated, sustained, not sustained, or unfounded.

If the conduct of any officer was found to be improper, the report shall cite the agency rule, regulation, or order which was violated. Also, any mitigating circumstances surrounding the situation, such as unclear or poorly drafted agency policy, inadequate training or lack of proper supervision, shall be noted.

If the investigation reveals evidence of misconduct not based on the original complaint, this must be reported. A full-scale investigation concerning evidence of misconduct not based on the original complaint should not be instituted until disposition of the original complaint.

Investigation of Firearms Discharges

Whenever a firearms discharge results in an injury or death the county prosecutor is to be notified immediately. Internal affairs personnel will proceed in the investigation as directed by the prosecutor.

All incidents involving officer firearms discharges, whether occurring on or off duty (except at the firearms range), must be thoroughly investigated. The Internal Affairs investigator should review all administrative reports required by the department. These reports should include a description of the incident; the date, time, and location of the incident; the type of firearm used

and number of rounds fired; the identity of the officer; and any other information requested by a superior officer.

Agencies that have established a "Shoot Team" to investigate officer firearms discharge incidents should place those teams under the supervision and control of the Internal Affairs commander when they are engaged in weapons discharge investigations.

Officers investigating firearms discharges must strive to conduct a thorough and objective investigation without violating the rights of the subject officer or any other police officer. Accordingly, all supervisors and any other officer who may be called upon to do a firearms discharge investigation must be thoroughly familiar with the department's entire internal affairs policy, including protection of the accused officer's rights and the procedures for properly investigating firearms discharges.

In the event of an injury or death, the Internal Affairs Unit shall be notified immediately. The involved officer's superior should assist the Internal Affairs investigator as needed.

The primary goal of the internal affairs firearms discharge investigation is to determine the reasonableness of the officer's actions under the circumstances which existed at the time of the incident. In order to make such a determination, the investigator must consider relevant law, Attorney General's policies and guidelines, and department rules and regulations, and policy. In addition to determining if the officer's actions were consistent with the department regulations and policy, the Internal Affairs investigator should also examine the relevance and sufficiency of these policies. The investigator should also consider any relevant mitigating or inculpatory circumstances.

The investigation of a shooting by police should include photographs and ballistics tests as well as interviews with all witnesses, complainants, and the officer involved. All firearms should be treated as evidence according to departmental rules, regulations, and policies. A complete description of the weapon, its make, model, caliber, and serial number must be obtained and, if appropriate, N.C.I.C. and S.C.I.C. record checks should be made.

In a firearms discharge investigation, the investigator must determine if the weapon was an approved weapon issued to the officer, and if the officer was authorized to possess the weapon at the time of the discharge. The investigator must also determine if the weapon was loaded with authorized ammunition.

The weapon must be examined for its general operating condition and to identify any unauthorized alterations made to it.

1. Penalties not available to agencies covered by New Jersey Department of Personnel regulations.
2. Agencies operating under the Department of Personnel statutes (N.J.S.A. 11A:2-20) and

regulations may only assess a fine in lieu of a suspension where loss of the officer from duty would be "detrimental to the public health, safety or welfare" or if the assessment is restitution or is agreed to by the employee.
3. Use immunity can only be granted by the county prosecutor.

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

Richard Rivera v. Union County Prosecutor's Office (A-58-20) (084867)

Argued January 4, 2022 -- Decided March 14, 2022

RABNER, C.J., writing for a unanimous Court.

This appeal centers around an internal affairs investigation into misconduct by a former police director. The key question is how to balance the need for confidentiality in internal affairs investigations with the public's interest in transparency when a member of the public seeks access to records of an investigation. The Court considers both the Open Public Records Act (OPRA) and the common law right of access.

In February 2019, an attorney made a complaint to the Union County Prosecutor's Office on behalf of employees of the Elizabeth Police Department. The complaint alleged that Police Director James Cosgrove, the civilian head of the Department for more than two decades, used racist and sexist language to refer to employees on multiple occasions. In response, the Prosecutor's Office conducted an internal affairs investigation. On April 16, 2019, the Office sustained the complaints; ten days later, the Attorney General issued a public statement describing the investigation and its conclusion and calling upon Cosgrove to resign, which he did.

In July 2019, plaintiff Richard Rivera filed a request for records with the Prosecutor's Office based on OPRA and the common law. As relevant here, plaintiff asked for "all internal affairs reports regarding" Cosgrove. The Prosecutor's Office denied the request on the ground that it was "exempt from disclosure under OPRA" and not subject to disclosure under the common law.

Plaintiff filed a complaint in 2019 against the Prosecutor's Office and its records custodian, relying on OPRA and the common law. The Prosecutor's Office answered, citing the need for confidentiality based on witnesses' expectations of privacy and the need to preserve the Office's ability to gather facts in similar investigations. The City of Elizabeth intervened and likewise stressed the importance of confidentiality, noting that witnesses' identities could be determined even with redactions and that disclosure would make it less likely that employees would report alleged workplace policy violations.

The trial court concluded the internal affairs report should be made available under OPRA. The Appellate Division reversed, finding that the requested materials were not exempt as "personnel records" under OPRA (N.J.S.A. 47:1A-10), but that they could not be disclosed under OPRA on other grounds (N.J.S.A. 47:1A-1, -9(a) and (b)). Next, the Appellate Division rejected plaintiff's common law claim, determining that defendant's interest in preventing disclosure outweighed plaintiff's right to the documents. The Court granted certification. 246 N.J. 236 (2021).

HELD: *OPRA does not permit access to internal affairs reports, but those records can and should be disclosed under the common law right of access -- subject to appropriate redactions -- when interests that favor disclosure outweigh concerns for confidentiality. The Court provides guidance on how to conduct that balancing test.

*In this case, the internal affairs report should be disclosed, as the Attorney General properly concedes, after the trial court reviews it and redacts parts that raise legitimate confidentiality concerns. The Court remands the matter to the trial court for it to review the report, complete the necessary balancing test, and enter an order of disclosure. The Court asks the trial court to proceed expeditiously.

1. OPRA gives the public ready access to government records unless the statute exempts those records from disclosure. Defendants argue that internal affairs reports are exempt under several sections of the statute. One of those provisions states that OPRA "shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." N.J.S.A. 47:1A-9(b) (emphases added). (pp. 12-13)

2. Section 9(b) clearly exempts internal affairs reports from public disclosure. The Attorney General has the authority under N.J.S.A. 52:17B-4(d) to "adopt rules and regulations for the efficient conduct of the work and general administration of the" Department of Law and Public Safety. Since 1991, the Attorney General has promulgated an Internal Affairs Policy and Procedures manual (IAPP) to address complaints of police misconduct; the IAPP contains a confidentiality provision that has largely remained intact since 1991. The current IAPP allows for disclosure in certain limited circumstances, but access is to be granted "sparingly," for good cause. In 1996, the Legislature enacted N.J.S.A. 40A:14-181, which directs all law enforcement agencies to "adopt and implement guidelines which shall be consistent with the" IAPP manual. When section 181 was enacted, the IAPP conferred confidentiality on internal affairs records, and the new law effectively made the IAPP's provisions required policy for law enforcement agencies. Viewed through that lens, section 181, a statute, effectively recognizes a grant of confidentiality established by the IAPP, and OPRA may not abrogate that grant of confidentiality.

See N.J.S.A. 47:1A-9(b). Section 9(b) of OPRA therefore exempts internal affairs reports from public disclosure, and the Court does not reach the parties' arguments relating to sections 1, 1.1, 9(a), or 10 of OPRA. (pp. 13-15)

3. OPRA does not limit the right of access to government records under the common law. N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017); N.J.S.A. 47:1A-8. The definition of a public record under the common law is broader than under OPRA. To obtain records under "this broader class of materials, [a] requestor must make a greater showing than OPRA requires." Id. at 578. In particular, "(1) 'the person seeking access must establish an interest in the subject matter of the material'; and (2) 'the [person's] right to access must be balanced against the State's interest in preventing disclosure.'" Ibid. (pp. 15-16)

4. Finding the right balance calls for a careful weighing of the competing interests. Loigman v. Kimmelman, 102 N.J. 98, 108 (1986). In Loigman, the Court identified six factors to consider in balancing those interests. Id. at 113. The list focuses primarily on the State's interest in preventing disclosure, but the public's level of interest must also be assessed. In Gannett Satellite Information Network, LLC v. Township of Neptune, the Appellate Division recently determined that a balancing of the interests favored the release of a police officer's internal affairs records. 467 N.J. Super. 385, 391-92, 408-09 (App. Div. 2021). (pp. 16-18)

5. Here, the trial court ordered disclosure based on its reading of OPRA. As a result, it did not analyze Rivera's common law claim or balance the relevant interests. On appeal, neither party briefed or argued the common law claim. The Appellate Division mistakenly assumed original jurisdiction and addressed the issue. In this case, the record is incomplete and does not allow for the fact-specific balancing test required under the common law. The internal affairs report is not in the record and has not been reviewed by the trial court. And there are no factual findings to review. The trial court is the best forum to elicit facts about the parties' interests under the common law and to balance those interests. (pp. 19-21)

6. The Court provides guidance about the balancing test. The Loigman factors are not a complete list of relevant considerations. See 102 N.J. at 113. They largely examine only one side of the test -- the need for confidentiality -- which "should be balanced [against] the importance of the information sought to the plaintiff's vindication of the public interest." Ibid. In general, the public has an interest in the disclosure of internal affairs reports to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement. See Lyndhurst, 229 N.J. at 579-80. (pp. 21-22)

7. The public interest in transparency may be heightened in certain situations depending on a number of considerations, including: (1) the nature and seriousness

of the misconduct; (2) whether the alleged misconduct was substantiated; (3) the nature of the discipline imposed; (4) the nature of the official's position; and (5) the individual's record of misconduct. The Court explains how those factors can weigh in the balancing test, stressing that it does not rely on whether an allegation has already been the subject of public interest through official statements or leaks. To allow a court to assess the factors -- those in favor of confidentiality as well as disclosure -- the parties should present more than generalized, conclusory statements. See Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 28 (2018); Lyndhurst, 229 N.J. at 580. The Court does not require judges to review actual internal affairs reports in every case because review of the relevant factors may suffice in individual cases. (pp. 22-24)

8. Considering the interests here, the Court notes that the public interest in disclosure is great. Racist and sexist conduct by the civilian head of a police department violates the public's trust in law enforcement. It undermines confidence in law enforcement officers generally, including the thousands of professionals who serve the public honorably. Public access helps deter instances of misconduct and ensure an appropriate response when misconduct occurs. Access to reports of police misconduct promotes public trust. The Court cannot fully evaluate defendant's concerns about confidentiality because they are supported by generic arguments. (pp. 24-25)

9. The trial court here can best assess any potentially legitimate confidentiality concerns by reviewing the report in camera and making appropriate redactions. At a minimum, judges should redact the names of complainants, witnesses, informants, and cooperators, as well as information that could reasonably lead to the discovery of their names; non-public, personal identifying information about officers and others, such as their home addresses and phone numbers; and personal information that would violate a person's reasonable expectation of privacy if disclosed, such as medical information. The Court agrees with the Attorney General that the redacted internal affairs report should be disclosed. (pp. 25-26)

REVERSED and REMANDED for further proceedings.

JUSTICES ALBIN, PATTERSON, SOLOMON, and PIERRE-LOUIS and JUDGE FUENTES (temporarily assigned) join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-58 September Term 2020

084867

Richard Rivera,

Plaintiff-Appellant,

v.

Union County Prosecutor's Office, and John Esmerado, in his official capacity as Records Custodian for the Union County Prosecutor's Office,

Defendants-Respondents,

and

City of Elizabeth,

Intervenor-Respondent.

On certification to the Superior Court, Appellate Division.

Argued	Decided
January 4, 2022	March 14, 2022

CJ Griffin argued the cause for appellant (Pashman Stein Walder Hayden, attorneys; CJ Griffin and Joshua P. Law, on the briefs).

April C. Bauknight, Assistant County Counsel, argued the cause for respondents Union County Prosecutor's Office and John Esmerado (Bruce H. Bergen, Union

County Counsel, attorney; April C. Bauknight, on the briefs).

Robert F. Varady argued the cause for respondent City of Elizabeth (La Corte, Bundy, Varady & Kinsella, attorneys; Robert F. Varady, of counsel, and Christina M. DiPalo, on the briefs).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties of New Jersey Foundation, attorneys; Alexander Shalom and Jeanne LoCicero, on the brief).

Michael R. Noveck, Assistant Deputy Public Defender, argued the cause for amici curiae Association of Criminal Defense Lawyers of New Jersey and Public Defender of New Jersey (Joseph E. Krakora, Public Defender, and Gibbons, attorneys; Lawrence S. Lustberg and Michael R. Noveck, on the brief).

Alec Schierenbeck, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Andrew J. Bruck, Acting Attorney General, attorney; Alec Schierenbeck and Raymond R. Chance, III, Assistant Attorneys General, of counsel, and Suzanne Davies and Valentina M. DiPippo, Deputy Attorneys General, on the brief).

Bruce S. Rosen submitted a brief on behalf of amici curiae Reporters Committee for Freedom of the Press & 24 Media Organizations (McCusker, Anselmi, Rosen, & Carvelli, attorneys; Bruce S. Rosen, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

This appeal centers around an internal affairs investigation into misconduct by a former police director. The key question is how to balance the need for confidentiality in internal affairs investigations with the public's interest in transparency when a member of the public seeks access to records of an investigation.

The investigation here found that the former director of the Elizabeth Police Department engaged in racist and sexist behavior while in office. Plaintiff sought access to the internal affairs report under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and the common law right of access. The Prosecutor's Office denied the request, and the Appellate Division ultimately ruled against plaintiff in a lawsuit he filed.

Although we find that OPRA does not permit access to internal affairs reports, those records can and should be disclosed under the common law right of access when interests that favor disclosure outweigh concerns for confidentiality.

Existing caselaw on the common law offers guidance on how to evaluate the need for confidentiality. See Loigman v. Kimmelman, 102 N.J. 98, 108 (1986). Today, we outline a number of factors to help courts evaluate the other side of the balancing test -- the need for public disclosure. Those factors include the nature and seriousness of the misconduct, whether it was

substantiated, the discipline imposed, the nature of the official's position, and the person's record of misconduct.

In this case, the public interest in disclosure is great. An internal affairs investigation confirmed that the civilian head of a police department engaged in racist and sexist conduct for many years. To date, defendant has raised only generalized concerns about confidentiality, and it does not appear that any court has yet examined the actual internal affairs report. We cannot fully evaluate defendant's claims on the incomplete record before us.

The internal affairs report should be disclosed, as the Attorney General properly concedes, after the trial court reviews it and redacts parts that raise legitimate confidentiality concerns. We therefore remand the matter to the trial court for it to review the report, complete the necessary balancing test, and enter an order of disclosure. We ask the court to proceed expeditiously.

I.

In February 2019, an attorney made a complaint to the Union County Prosecutor's Office on behalf of employees of the Elizabeth Police Department. The complaint alleged that Police Director James Cosgrove, the civilian head of the Department for more than two decades, used racist and sexist language to refer to employees on multiple occasions.

In response, the Prosecutor's Office conducted an internal affairs investigation. On April 16, 2019, the Office notified the attorney in writing that "Cosgrove has used derogatory terms in the workplace when speaking about city employees," in violation of Elizabeth's policies against discrimination and harassment. The Prosecutor's Office noted "the complaints are sustained." The attorney disclosed the letter to the media, which reported on it.

On April 26, 2019, Attorney General Gurbir S. Grewal issued a public statement about the Cosgrove matter. In it, he noted the two-month internal affairs investigation had "concluded that, over the course of many years, Director Cosgrove described his staff using derogatory terms, including racist and misogynistic slurs." Statement of Att'y Gen. Gurbir S. Grewal (Apr. 26, 2019), https://www.nj.gov/oag/newsreleases19/pr20190426c.html. The Attorney General called on Cosgrove to resign immediately, appointed the First Assistant Attorney General as Acting Union County Prosecutor, and directed her to conduct an audit of the Police Department's "workplace culture." Ibid. Cosgrove resigned soon after.

On July 1, 2019, plaintiff Richard Rivera filed a request for records with the Prosecutor's Office based on OPRA and the common law. He asked for (1) "the report regarding Elizabeth PD's internal affairs issues and claims of

racism and misogyny," and (2) "all internal affairs reports regarding" Cosgrove. Plaintiff acknowledged "that redactions may be required, for example, to protect the identity of a complainant," and asked for redacted reports.

The Prosecutor's Office denied the request. As to the first item, it stated that, "in general . . . no such report exists." The Office declined to disclose the internal affairs report on Cosgrove both because it was "exempt from disclosure under OPRA" as a "personnel and/or internal affairs record," and because the "interest[s] in maintaining confidentiality significantly outweigh [plaintiff's] interests in disclosure."

To get access to the internal affairs report about Cosgrove, plaintiff filed a complaint on August 21, 2019 against the Prosecutor's Office and its records custodian, relying on OPRA and the common law. In the alternative, plaintiff asked the trial court to review the records, redact parts that are exempt from public access, and disclose the remainder.

The Prosecutor's Office filed an answer along with a certification from Assistant Prosecutor John G. Esmerado, the Office's Investigations Supervisor. Esmerado stated that

> multiple sworn law enforcement and civilian parties, throughout the investigation, . . . were extremely reticent to provide sworn statements if their statement was to be shared with any other party. The

> information gathering process was difficult given the sensitive nature of the inquiry. To release the information would unduly hamper and compromise the ability of the Union County Prosecutor's Office to investigat[e] police chiefs and police directors in the future for alleged misconduct investigations. Investigations of a police director, as the civilian leader of the police department is always difficult given the understandably strong sense of leadership a police director brings to a department. To preserve our ability to gather facts, internal affairs reports must maintain confidentiality.

The trial court granted the City of Elizabeth leave to intervene. In support of its motion, Elizabeth submitted a certification from William Holzapfel, the City Attorney. He expressed similar, generic concerns:

> The City requires that confidentiality of the facts discovered during the [internal affairs] investigation be maintained. . . . [T]he City has a real concern that even with redactions as to the identities of any complainants or any other persons who serve as . . . witnesses, the privacy interests of its employees involved will not be protected if there is a public disclosure of the Prosecutor's report.

Holzapel added that disclosure "would have a 'chilling effect' upon City employees to report any future alleged violation of workplace policies." Holzapel noted that "[t]he City was advised of the findings of the internal investigation" but did not say whether he reviewed the actual internal affairs report.

At oral argument and in a later written order, the trial court concluded the internal affairs report should be made available under OPRA. The judge directed that "the complete set of investigation materials . . . into the conduct of former Elizabeth Police Director James Cosgrove" be provided to the court for in camera review. The court explained its intention was to disclose "the thrust of the investigation" and also "protect those individuals who could unnecessarily be at risk by public disclosure." In light of the court's ruling under OPRA, it did not reach plaintiff's common law claim.

The Appellate Division granted leave to appeal, stayed the trial court's order, and later reversed its judgment. The Appellate Division initially found the requested materials were not exempt as "personnel records" under OPRA. (citing N.J.S.A. 47:1A-10). The court, however, held that internal affairs reports could not be disclosed under OPRA on other grounds. It relied on N.J.S.A. 47:1A-1 and -9, which provide that OPRA does not abrogate exemptions from public access granted by statute or regulation. Id. § 9(a), (b).

The court explained that the Attorney General adopted an Internal Affairs Policy and Procedures (IAPP) manual pursuant to his statutory authority; the policy ensured that internal affairs records would be confidential, with some exceptions; and the Legislature required all law enforcement agencies to adopt guidelines consistent with the IAPP. As a

result, the appellate court concluded that internal affairs reports were exempt from disclosure under section 9. In addition, the court observed that disclosure "could well . . . impair[] the laudable goals of IA investigations" and that redacting "names and identifying circumstances . . . would likely prove very difficult, if not impossible."

Next, the Appellate Division rejected plaintiff's common law claim, even though the trial court had not reached the issue. Without the benefit of the internal affairs report itself, the court determined that defendant's interest in preventing disclosure outweighed plaintiff's right to the documents. The court noted that disclosure would discourage witnesses from coming forward, "would likely disclose their identity," and would frustrate the internal affairs process. The court once again questioned the "adequacy of protecting anonymity through simple redaction."

The Appellate Division later denied plaintiff's motion for reconsideration, in which he asserted it was error for the court to exercise its original jurisdiction and address the common law claim.

We granted plaintiff's petition for certification. 246 N.J. 236 (2021). We also granted leave to appear as amici curiae to the American Civil Liberties Union of New Jersey (ACLU); the Association of Criminal Defense Lawyers (ACDL) and the Public Defender, who submitted a joint brief; the

Reporters Committee for Freedom of the Press along with twenty-four media organizations (Reporters Committee); and the Attorney General.

II.

Plaintiff argues the internal affairs report should be made available under both OPRA and the common law. He maintains that none of OPRA's exemptions apply. In particular, he contends that the Attorney General's IAPP does not fall within the enumerated exceptions under sections 1 and 9 of OPRA. Plaintiff also submits that the Appellate Division erred in its analysis of the common law right of access and should have remanded the matter to the trial court for an in camera review of the internal affairs report.

Various amici support plaintiff's position and argue for the release of the report. Focusing on the common law claim, the ACLU contends the Appellate Division placed too much weight on the IAPP and the generalized need to maintain confidentiality in internal affairs reports. The ACDL and Public Defender argue that New Jersey law favors transparency in public records requests and criminal discovery, and that internal affairs files often contain evidence relevant to criminal cases that can be uncovered by a public records request. The Reporters Committee points to other states that allow access to records of misconduct by law enforcement and emphasizes how important it is for journalists to obtain and report on such records.

The Prosecutor's Office urges the Court to affirm the Appellate Division. The Office asserts that internal affairs reports must be kept confidential consistent with the IAPP as well as the letter and spirit of OPRA. Applying the Loigman factors, the Prosecutor's Office also contends the records should not be accessible under the common law because the interest in confidentiality outweighs the public's interest in access. The City of Elizabeth, as an intervenor, echoes those arguments.

The Attorney General argues that all internal affairs materials are exempt from disclosure under sections 1 and 9 of OPRA. According to the Attorney General, however, appropriately redacted internal affairs reports may be released under the common law in certain cases, based on a careful balancing of the relevant interests. The Attorney General proposes a number of factors for courts to consider in weighing the public's interest in transparency. In this case, the Attorney General concedes the factors "strongly suggest that disclosure of the internal affairs report at issue . . . is appropriate." To determine what redactions are necessary, the Attorney General asks the Court to remand the case to the trial court so that it can review the report in camera and apply the relevant factors.

III.

We begin with certain familiar principles about OPRA. OPRA is designed to give members of the public "ready access to government records" unless the statute exempts them from disclosure. Burnett v. County of Bergen, 198 N.J. 408, 421 (2009). The law's core concern is to promote transparency in government. Id. at 414. Maximizing "knowledge about public affairs," in turn, can "ensure an informed citizenry and . . . minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Off., 374 N.J. Super. 312, 329 (Law Div. 2004)). Yet without access to government records, even the most engaged members of the public "cannot monitor the operation of our government or hold public officials accountable." Fair Share Hous. Ctr., Inc. v. State League of Muns., 207 N.J. 489, 502 (2011).

To help achieve those aims, the statute broadly defines the term "government record" as any document "made, maintained or kept on file in the course of . . . official [government] business." N.J.S.A. 47:1A-1.1. OPRA also exempts more than twenty categories of records from the definition, ibid., and places on public agencies the burden to prove that a requested item is exempt from disclosure, id. § 6.

Defendants argue that internal affairs reports are exempt under several sections of the statute. One of the provisions defendants invoke is section 9(b), which provides that OPRA

> shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or government record.
>
> [(emphases added).]

To interpret a statute, we start with the text of the law and give words their generally accepted meaning. DiProspero v. Penn, 183 N.J. 477, 492-93 (2005); N.J.S.A. 1:1-1. In most situations, if the law is clear, our analysis is complete. DiProspero, 183 N.J. at 492-93. Here, we find that the language of section 9(b) clearly exempts internal affairs reports from public disclosure.

The Attorney General has the authority under N.J.S.A. 52:17B-4(d) to "adopt rules and regulations for the efficient conduct of the work and general administration of the" Department of Law and Public Safety. In 1991, Attorney General Del Tufo issued the Department's first Internal Affairs Policy and Procedures manual. In re Att'y Gen. Directives, 246 N.J. 462, 483 (2021). It established a comprehensive process to address complaints of police misconduct. Ibid. The IAPP also contained a confidentiality provision which

"guaranteed that '[t]he progress of internal affairs investigations and all supporting materials are considered confidential information.'" Ibid. (quoting 1991 IAPP at 15).[1]

The IAPP's confidentiality provision has largely remained intact since 1991. The current IAPP allows for disclosure in certain limited circumstances -- for example, at the direction of the county prosecutor or the Attorney General, or pursuant to a court order. 2021 IAPP § 9.6.1. But access is to be granted "sparingly," for good cause. Id. § 9.6.2. Recently, the Attorney General directed that law enforcement officers subject to major discipline are to be identified publicly. In re Att'y Gen. Directives, 246 N.J. at 485, 488 (upholding Directive Nos. 2020-5 & 2020-6).

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[1] The Attorney General draws a distinction between internal affairs investigation "files" and "reports." Files should encompass "the investigation's entire work product" and include "investigators' reports, transcripts of statements, and copies of all relevant documents." 2021 IAPP § 9.3.2. The internal affairs report is prepared at the end of an investigation and "consist[s] of an objective investigative report recounting all of the case's facts and a summary of the case, along with conclusions for each allegation, and recommendations for further action." Id. § 9.1.1.

This case involves a request for internal affairs reports. The complaint quotes and cites plaintiff's OPRA request, which sought "[a] copy of all internal affairs reports regarding . . . Cosgrove." Complaint ¶ 30; see also id. ¶ 43. At oral argument, plaintiff's counsel confirmed the request was for "reports," not witness statements or work product. Our focus is therefore on the internal affairs report or reports about Cosgrove.

In 1996, the Legislature enacted a law that "underscores the force of the IAPP." Id. at 488. The statute, N.J.S.A. 40A:14-181, directs all law enforcement agencies to "adopt and implement guidelines which shall be consistent with the" IAPP manual. When section 181 was enacted, the IAPP conferred confidentiality on internal affairs records, and the new law effectively made the IAPP's provisions required policy for law enforcement agencies. See Fraternal Ord. of Police, Newark Lodge No. 12 v. City of Newark (FOP), 244 N.J. 75, 101 (2020).

Once again, the critical language in section 9(b) states that OPRA "shall not abrogate or erode any . . . grant of confidentiality . . . recognized by . . . statute." N.J.S.A. 47:1A-9(b). Viewed through that lens, section 181, a statute, effectively recognizes a grant of confidentiality established by the IAPP. OPRA may not abrogate such a grant of confidentiality. Ibid. Section 9(b) of OPRA therefore exempts internal affairs reports from public disclosure.

As a result, we do not reach the parties' other arguments relating to sections 1, 1.1, 9(a), or 10 of OPRA.

IV.

Rivera alternatively seeks access to the internal affairs report under the common law. Although both paths raise similar considerations, OPRA does

not limit the right of access to government records under the common law. N. Jersey Media Grp., Inc. v. Township of Lyndhurst, 229 N.J. 541, 578 (2017); N.J.S.A. 47:1A-8 ("Nothing contained in [OPRA] . . . shall be construed as limiting the common law right of access to a government record, including criminal investigatory records of a law enforcement agency.").

A.

The definition of a public record under the common law is broader than under OPRA. Mason, 196 N.J. at 67. To constitute a common law public record, an item must "be a written memorial . . . made by a public officer, and . . . the officer [must] be authorized by law to make it." Nero v. Hyland, 76 N.J. 213, 222 (1978) (quoting Josefowicz v. Porter, 32 N.J. Super. 585, 591 (App. Div. 1954)). Under that standard, the internal affairs report is a public record.

To obtain records under "this broader class of materials, [a] requestor must make a greater showing than OPRA requires." Lyndhurst, 229 N.J. at 578. In particular, "(1) 'the person seeking access must establish an interest in the subject matter of the material'; and (2) 'the [person's] right to access must be balanced against the State's interest in preventing disclosure.'" Ibid. (quoting Mason, 196 N.J. at 67-68). Finding the right balance calls for a careful weighing of the competing interests. Loigman, 102 N.J. at 108.

The Court in Loigman identified six factors to consider in balancing the interests:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government;
>
> (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed;
>
> (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure;
>
> (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers;
>
> (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and
>
> (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [Id. at 113.]

The list focuses primarily on the State's interest in preventing disclosure.

Statutes and regulations can also factor into the balancing process but do not determine its outcome. Expressions of executive or legislative policy can weigh very heavily in the analysis, but they are not dispositive. Home News v. Dep't of Health, 144 N.J. 446, 455 (1996); S. N.J. Newspapers, Inc. v.

Township of Mt. Laurel, 141 N.J. 56, 76 (1995); Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 48 (1995).

The Court has previously looked to the common law to consider the release of law enforcement records that were not accessible under OPRA. See Lyndhurst, 229 N.J. at 578-81 (ordering disclosure of dash cam recordings); Paff v. Ocean Cnty. Prosecutor's Off., 235 N.J. 1, 30 (2018) (remanding to consider the release of dash cam footage); Gilleran v. Township of Bloomfield, 227 N.J. 159, 177-78 (2016) (noting that footage from a security camera protecting public facilities could qualify for release in certain circumstances).

In Gannett Satellite Information Network, LLC v. Township of Neptune, the Appellate Division recently upheld a trial court's decision to release a police officer's internal affairs records. 467 N.J. Super. 385, 391 (App. Div. 2021). After his multiple incidents of domestic violence, the officer shot and killed his ex-wife with his service revolver, in front of their young daughter. Id. at 391-92. The court concluded the records were exempt from disclosure under OPRA but should be made available under the common law. Id. at 391. As part of its balancing of interests, the court pointed to the horrific nature of the crime committed by an off-duty officer, the public's "strong interest in knowing how such an event could have occurred" in light of the officer's history, and the extensive public reporting on the matter. Id. at 408-09.

B.

The trial court ordered disclosure in this case based on its reading of OPRA. As a result, it did not analyze Rivera's common law claim or balance the relevant interests. On appeal, neither party briefed or argued the common law claim. The Appellate Division mistakenly assumed original jurisdiction and addressed the issue.

Appellate courts can "exercise . . . original jurisdiction as is necessary to the complete determination of any matter on review." R. 2:10-5. That power should be invoked "sparingly," State v. Jarbath, 114 N.J. 394, 412 (1989), and is generally used when the record is adequately developed and no further fact-finding is needed, Price v. Himeji, LLC, 214 N.J. 263, 294-95 (2013); State v. Santos, 210 N.J. 129, 142 (2012). Original jurisdiction can also be invoked "to eliminate unnecessary further litigation," Santos, 210 N.J. at 142, or when the public interest favors "an expeditious disposition of [a] significant issue[]," Karins v. City of Atlantic City, 152 N.J. 532, 540-41 (1998).

In this case, the record is incomplete and does not allow for the fact-specific balancing test required under the common law. The internal affairs report is not in the record and has not been reviewed by the trial court. And there are no factual findings to review.

The record consists primarily of two brief certifications from the Prosecutor's Office and the City of Elizabeth that do not disclose particular facts about what took place. As noted earlier, the certifications chiefly contain generalized statements about how disclosure of the internal affairs report might not protect the privacy interests of witnesses and employees, could have a chilling effect on their willingness to report violations in the future, and could thus hamper future investigations into police misconduct.

The trial court is the best forum to elicit facts about the parties' interests under the common law and to balance those interests. See Phila. Newspapers, Inc. v. Dep't of L. & Pub. Safety, 232 N.J. Super. 458, 466 (App. Div. 1989). For that reason, appellate courts routinely remand cases to the Law Division to conduct the balancing test. See, e.g., Paff, 235 N.J. at 30; Gilleran, 227 N.J. at 177; S. N.J. Newspapers, Inc., 141 N.J. at 75; S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 498 (1991); Drinker Biddle & Reath LLP v. Dep't of L. & Pub. Safety, 421 N.J. Super. 489, 501 (App. Div. 2011). Because the record is inadequate to fully resolve plaintiff's common law claim, and the trial court has not yet addressed the issue, we remand the matter to the trial judge to review the internal affairs report in camera and complete a fact-sensitive balancing test.

We also offer additional guidance to assist trial courts in balancing the public interest and the need for confidentiality. In doing so, we draw on a number of thoughtful suggestions offered by the Attorney General and plaintiff.

C.

The Loigman factors are not a complete list of relevant considerations, as the Court noted in its decision. 102 N.J. at 113. They largely examine only one side of the balancing test -- the need for confidentiality. Ibid. Confidentiality in internal investigations can be important in certain matters to encourage witnesses to come forward and cooperate; to protect personal information about witnesses, victims, the subject of an investigation, and others; and to avoid impairing the internal affairs process, among other reasons. See ibid.; FOP, 244 N.J. at 106. Those concerns are reflected in the IAPP's treatment of internal affairs materials generally.

The Loigman Court acknowledged that the six factors it identified, as well as other considerations, "should be balanced [against] the importance of the information sought to the plaintiff's vindication of the public interest." Loigman, 102 N.J. at 113. We turn our attention to that part of the balancing test now.

In general, the public has an interest in the disclosure of internal affairs reports in order to hold officers accountable, to deter misconduct, to assess whether the internal affairs process is working properly, and to foster trust in law enforcement. See Lyndhurst, 229 N.J. at 579-80. The public interest in transparency may be heightened in certain situations depending on a number of considerations. They include the following factors and others:

(1) *the nature and seriousness of the misconduct.* Serious misconduct gives rise to a greater interest in disclosure. For example, misconduct that involves the use of excessive or deadly force, discrimination or bias, domestic or sexual violence, concealment or fabrication of evidence or reports, criminal behavior, or abuse of the public trust can all erode confidence in law enforcement and weigh in favor of public disclosure;

(2) *whether the alleged misconduct was substantiated.* Unsubstantiated or frivolous allegations of misconduct present a less compelling basis for disclosure;

(3) *the nature of the discipline imposed.* Investigations that result in more serious discipline, like an officer's termination, resignation, reduction in rank, or suspension for a substantial period of time, favor disclosure. See In re Att'y Gen. Directives, 246 N.J. at 485;

(4) *the nature of the official's position.* Wrongdoing by high-level officials can impair the work of the department as a whole, including the functioning of the internal affairs process; and

(5) *the individual's record of misconduct.* The public's interest in disclosure extends to all officers -- regardless of rank -- whose serious or repeated misconduct may pose a danger to the public.

As to all of those areas, transparency can expose problems that need to be addressed or reassure the public about police conduct.

We do not rely on whether an allegation has already been the subject of public interest as part of the balancing process. Official statements or leaks that may attract public attention should not drive the disclosure analysis; the question is whether the misconduct in question is rightly a matter of public interest, even if the information has not yet been revealed.

To assess the above factors -- those in favor of confidentiality as well as disclosure -- the parties should present more than generalized, conclusory statements. See Paff, 235 N.J. at 28; Lyndhurst, 229 N.J. at 580. More detailed objections enable judges to conduct the delicate balancing the common law requires. As part of that analysis, we do not require judges to review actual internal affairs reports in every case. See S. Jersey Publ'g Co.,

124 N.J. at 499. A preliminary review of the relevant factors may suffice in individual cases.

V.

As noted earlier, the internal affairs report qualifies as a public record under the common law. And defendant and the City of Elizabeth do not dispute that plaintiff has an interest in the documents requested. We therefore focus on the required balancing of interests under the common law.

There are good reasons to protect the confidentiality of internal affairs reports under the common law in many instances. This is not one of them.

In this case, the Attorney General concedes that some form of the internal affairs report about Cosgrove should be disclosed under the common law. A number of the above factors weigh heavily in favor of disclosure and lead to the same conclusion.

The allegations against Cosgrove involved serious misconduct -- racist and sexist behavior in office over an extended period of time. An investigation substantiated the serious claims against Cosgrove. That finding led to his resignation weeks later. See Lyndhurst, 229 N.J. at 580 n.10 (noting the need for confidentiality may wane after an investigation has ended).

Cosgrove held the position of police director, the civilian leader of the Elizabeth Police Department. As someone at the highest echelon of the

department, his behavior had the capacity to influence others and set the tone for the department. His position could also cast doubt on the department's internal affairs process and its ability to monitor itself, and raise questions about whether others knew what was happening.

In a matter like this, the public interest in disclosure is great. Racist and sexist conduct by the civilian head of a police department violates the public's trust in law enforcement. It undermines confidence in law enforcement officers generally, including the thousands of professionals who serve the public honorably.

As we recently noted, "access to public records fosters transparency [and] accountability." Libertarians for Transparent Gov't v. Cumberland County, ___ N.J. ___, ___ (2022) (slip op. at 18-19). Public access helps deter instances of misconduct and also helps ensure an appropriate response when misconduct occurs. In the long run, access to reports of police misconduct like the one sought here promotes public trust.

We cannot fully evaluate defendant's concerns about confidentiality because they are supported by generic arguments. The trial court here can best assess any potentially legitimate confidentiality concerns by reviewing the report in camera and making appropriate redactions. See S. Jersey Publ'g Co., 124 N.J. at 499. At a minimum, judges should redact the names of

complainants, witnesses, informants, and cooperators, as well as information that could reasonably lead to the discovery of their names; non-public, personal identifying information about officers and others, such as their home addresses and phone numbers; and personal information that would violate a person's reasonable expectation of privacy if disclosed, such as medical information.[2]

For those reasons, we agree with the Attorney General that the internal affairs report should be disclosed. At this time, though, without a more complete record and factual findings to review, we are not in a position to determine the scope of what can be released. We therefore remand to the trial court to review the internal affairs report in camera and complete the necessary balancing test on an expedited basis.

VI.

For those reasons, we reverse the judgment of the Appellate Division and remand the matter for further proceedings consistent with this opinion.

[2] In his OPRA request, plaintiff asked the Prosecutor's Office to produce redacted records to protect the identity of any complainants. Before this Court, he continues to have no objection to redactions of names and other identifying information about complainants and witnesses.

JUSTICES ALBIN, PATTERSON, SOLOMON, and PIERRE-LOUIS and JUDGE FUENTES (temporarily assigned) join in CHIEF JUSTICE RABNER's opinion.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

KAREN THOMPSON
Senior Staff Attorney

973-854-1729
kthompson@aclu-nj.org

November 30, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-6-20 State v. Edwin Andujar (084167)
Appellate Division Docket No. A-0930-17T1

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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PRELIMINARY STATEMENT

It is both an honor and a duty to participate in our judicial process as a juror. Any impediment to that participation must be viewed with alarm and skepticism, for the derogation of that duty undermines bedrock principles of fairness and due process as well as a fundamental trust in the integrity of the system itself. When the State conducted a criminal background check on and subsequently arrested F.G. for showing up to jury duty and honestly answering questions put to him by the trial court judge, it damaged one of the most basic protections provided to criminal defendants and adulterated a foundational belief in the ethical functioning of the system itself. No longer a space of impartiality populated by representative peers, in taking this most extreme action, the State rendered jury service a pretextual step towards criminalization and rendered the courthouse into a potential threat to freedom rather than a proud locus of civic engagement.

In this brief, the American Civil Liberties Union of New Jersey ("ACLU-NJ" or "*Amicus*") discusses how the State's use of its law enforcement power against F.G. as a replacement for showing cause or deploying one of its preemptory challenges deprived Mr. Andujar of equal protection and his right to trial by an impartial jury. (Point I).

In light of the grave injustices done to F.G. in this case, Mr. Andujar's conviction was properly reversed and this Court should affirm the Appellate

Division's decision. The Court should also provide a clear remedy should such actions occur again in the future, including, but not limited to: (1) reseating the wrongfully excused juror; (2) dismissing the jury panel and starting jury selection anew; or (3) ordering the forfeiture of one peremptory challenge of the party who sought to sidestep the use of a peremptory challenge through the blatant abuse of the law enforcement powers.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts and incorporates the statement of facts and procedural history contained within Defendant-Respondent's Appellate Division briefs. In a published opinion, the Appellate Division reversed Defendant's conviction. *State v. Andujar*, 462 N.J. Super. 537 (App. Div. 2020). The State filed a Petition for Certification, which this Court granted. *State v. Andujar*, 244 N.J. 170 (2020). This brief accompanies a Motion for Leave to Participate as *Amicus Curiae*. *R*. 1:13-9(e).

ARGUMENT

I. THE STATE'S SELECTIVE USE OF A CRIMINAL BACKGROUND CHECK DENIED MR. ANDUJAR FOUNDATIONAL STATE AND FEDERAL CONSTITUTIONAL PROTECTIONS.

The essential issue around the criminal history check and subsequent arrest of F.G. does not squarely implicate a *Batson v. Kentucky* 476 U.S. 79 (1986) violation, as no preemptory strike was used here. Rather, the prosecutor's actions

sit within a matrix of *Batson*-adjacent and *Batson*-informed power abuses that lie outside "the permissible middle ground of reasonable, nondiscriminatory prosecutorial discretion." *State v. Gilmore*, 103 N.J. 508, 538 (1986), holding modified by *State v. Osorio*, 199 N.J. 486 (2009), holding modified by *State v. Andrews*, 216 N.J. 271 (2013). Having failed to assert valid reasons for striking F.G. for cause, the prosecutor substituted her law enforcement powers for the use of a preemptory challenge and thus avoided the need to generate "'sham excuses belatedly contrived to avoid admitting acts of group discrimination.'"[1] *State v. Gilmore*, 199 N.J. Super. 389, 409 (App. Div. 1985), aff'd, 103 N.J. 508 (1986), (quoting *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748, 765 (1978)). Rather than defend impermissible racial considerations implicated by her failure to use a preemptory strike, the prosecutor shifted the framework, from one requiring facial neutrality to one consisting of a manufactured criminality.

In circumventing a *Batson* challenge by arresting F.G. on an open warrant for an alleged infraction for which *he had not been convicted*, the prosecutor violated Mr. Andujar's constitutional rights by purposefully making F.G.

[1] Again, while the background check and arrest of F.G. are not squarely within the four corners of a *Batson* challenge, the lack of a direct overlay is partially attributable to the fact that in having F.G. arrested, the prosecutor circumvented any analysis that would have interrogated his unavailability and applied *Batson*'s three-step methodology to his unceremonious dismissal from the jury. *See Andujar*, 462 N.J. Super. at 555; §I(A), *infra*.

"unavailable" to serve through an unjustified criminal history search and subsequent arrest.[2] In light of this unprecedented act and the unchartered waters this case traverses, the reversal of Mr. Andujar's conviction should be upheld, new rules should be produced protecting jurors from the unwarranted use of criminal history checks by prosecutors, and directions should be provided to the trial courts to allow them to "choose from a broader set of remedies fashioned to respond to the circumstances of the individual case . . . [with] the twin goals of assuring a fair trial and redressing the constitutionally impermissible behavior." *Andrews*, 216 N.J. at 273.

A. Mr. Andujar Was Denied His Constitutional Right to Equal Protection of Law.

"To establish an Equal Protection violation, a defendant must show purposeful discrimination in the decision-making process that had a discriminatory

[2] As the Appellate Division stated, "[t]he municipal warrant that the State uncovered is not part of the record on appeal. Nor is there any documentation to support the prosecutor's assertion that F.G. 'beat women.' We emphasize New Jersey does not bar people from juries because they have been arrested, nor do we bar people who have municipal warrants or convictions for traffic violations . . . or other non-indictable offenses." *Andujar*, 462 N.J. Super. at 554. In order to remove a juror without the need for explanation, accountability, or cause, the State abused its power by subjecting an individual entirely qualified to perform his civic duty to arrest for what could be a minor traffic infraction—infractions themselves too often used as pretexts for racial profiling. *See* Blake Nelson, *N.J. State Police must improve tracking possible racial profiling in traffic stops, audit says*, NJ.com (May 15, 2020), https://www.nj.com/news/2020/05/nj-state-police-must-improve-tracking-possible-racial-profiling-in-traffic-stops-audit-says.html.

effect on the outcome. Purposeful discrimination implies that the decisionmaker selected a particular course of action 'at least in part 'because of,' not merely 'in spite of' its adverse effects . . . .'" *State v. Timmendequas*, 161 N.J. 515, 562 (1999). Here, having failed to demonstrate, articulate, or justify unfitness for cause, the State chose to arrest F.G. rather than use a preemptory strike and simultaneously evaded scrutiny for its actions. The prosecutor's association of intimated criminality with F.G.'s suitability to serve as a juror creates *de facto* discrimination that violated Fourteenth Amendment guarantees of equal protection.

By their own arguments, the prosecutors' "causes" to strike F.G. were that he "has an awful lot of background . . . . in the criminal justice system with friends and family" and that it was "very concerning his close friends hustle, engaged in criminal activity . . . [t]hat draws into question whether he respects the criminal justice system, whether he respects what his role is here, and whether he is going to uphold all of the principles that he was instructed by your Honor."[3] (3T 94:11; 95:7-9; 95:13-20)[4]. These assertions were met with the trial court's finding: "I don't think there has been any reason at all that this juror should be excused for cause." (*Id.* at 97:23-25).

[3] It is worth noting that both prosecutors failed to credit, or even mention, F.G.'s two family associations who were police officers in Newark and Irvington. (3T 65:20-22).

[4] 3T refers to the transcript dated May 31, 2017.

The prosecutor—based on no evidence whatsoever that F.G. was presenting false information about his own criminal history—bet on finding something in F.G.'s record that would justify his arrest. The State's need to remove F.G. was thus not based on any particular action or proof of bias, but merely his proximity to others who had contacts with the system.

The clear effort here was to make F.G. disqualified to serve by association, not reason. While the lines between the dots to exclusion based on race are not immediately visible, the prosecutor's repeated statements regarding F.G.'s "background" makes the implicit association explicit. In 2018, nearly half of the population of Newark consisted of Black people and there were 2.66 times more Black residents of Newark than any other race or ethnicity.[5] In New Jersey, Black people are incarcerated at a rate twelve times higher than white people.[6] Harsh drug laws are an important factor in creating these persistent racial and ethnic disparities given that drug crimes disparities are especially severe, due largely to the fact that Black people are nearly four times as likely as white people to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession

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[5] *See* Data USA: Newark, https://datausa.io/profile/geo/newark-nj/ - demographics (last visited Nov. 27, 2020).

[6] *See* Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

despite the evidence that both groups use drugs at roughly the same rate; from 1995 to 2005, Black people comprised approximately 13 percent of drug users but 36% of drug arrests and 46% of those convicted for drug offenses.[7]

Accordingly, to be Black in New Jersey, and particularly in Newark, means to face a higher possibility of knowing someone arrested or prosecuted for drug crimes as a direct result of these over-policing discrepancies. As F.G. put it:

> "I grew up in a neighborhood where it just ain't good. You learn a lot of things from the streets . . . [but] everybody in here, jurors and everybody, got a background . . . and everybody got different perspectives about everything . . . mine's might be a little different than the next person. The next person's might be [a] little different according to where they grew up and how they grew up."
>
> [3T 79:21-23; 88:24-89:7.]

This "different perspective", or the specificity of F.G.'s particular "background", did not render him unable to be an impartial jurist; it merely made him a citizen in a heterogenous society. No legitimate reason existed for F.G. to be dismissed from Mr. Andujar's jury and his dismissal harmed Mr. Andujar by denying him a competent juror on unjustified, discriminatory grounds.

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[7] *Id.*; *see also Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System,* The Sentencing Project (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

B. Mr. Andujar Was Denied His Constitutional Right to Trial by Jury Comprising a Cross-Section of the Community.

The discriminatory juror disqualification at the heart of this appeal also deprived Mr. Andujar of a constitutionally sound trial. A defendant has a constitutional right to an impartial jury. *State v. Harvey*, 151 N.J. 117, 210 (1997). Under the New Jersey Constitution, the right to trial by an impartial jury drawn from a representative cross-section of the community is of "exceptional significance" and "goes to the very essence of a fair trial." *State v. Williams*, 93 N.J. 39, 60 (1983); N.J. Const. Art. 1, paras. 1, 5, 9, 10.

Of the few constraints New Jersey imposes on qualified jurors, one is simply that jurors "shall not have been convicted of any indictable offense under the laws of this [s]tate, another state, or the United States." N.J.S.A. 2B:20-1(e). While F.G. readily and freely admitted that he had many friends from his neighborhood who had been both victims of crime and charged (and in some instances convicted) with crimes, he never stated that he had been convicted of an indictable offense because he had not been convicted one. Yet, based on his forthright answers, the prosecutor argued he should be excused for cause simply for knowing people who had been in the criminal justice system or had been victims of crime.

As this court noted in *Gilmore*, "the representative cross-section rule not only promotes the overall impartiality of the deliberative process but also enhances the legitimacy of the judicial process in the eyes of the public by serving the

following 'other essential functions': 'legitimating the judgments of the courts, *promoting citizen participation in government, and preventing further stigmatizing of minority groups*.'" *Gilmore*, 103 N.J. at 525 (emphasis added) (quoting *Wheeler*, 583 P.2d at 755 n. 6.). The State Constitution, in providing, where appropriate, more expansive, sources of protections than the Federal Constitution, requires this Court to ensure that these other essential functions are reinforced, and not eroded by the behavior exhibited by the State. *State v. Ramseur*, 106 N.J. 123, 190 (1987).

If Mr. Andujar's conviction is allowed to stand, serious concerns arise that the State's actions—arresting a juror with a municipal warrant—will become commonplace.[8] In attempting to end racial disparities in the criminal justice system, courts must identify the inflection points at which those disparities appear, or may be encouraged by the action, and identify possible ways to dispel the root causes. This sort of abuse of law enforcement powers is one such cause. Here, the threat of arrest for jurors whose social and familial circles exist in places where there are higher incidents of arrest and incarceration will have a disparate impact on people of color whose communities already bear the brunt of over-policing; it certainly has already likely chilled citizen participation in government, and it has

[8] Indeed, the Essex County Prosecutor's Office's interest in such a practice can be seen in its earlier, unsuccessful attempt to obtain authorization to conduct blanket criminal history checks on jurors. *In re State ex rel. Essex County Prosecutor's Office*, 427 N.J. Super. 1 (Law. Div. 2012).

most certainly contributed to further stigmatizing minority groups. *See* e.g. § I(A). Accordingly, this action should be seen for the egregious overreach it is.

What constitutes a representative cross-section of fair and impartial jurors, while not reduced to a mathematical formula, should not exclude particular life experiences that do not easily fit into a single, blinkered view of "normalcy."[9] This Court has long upheld the basic principle that the New Jersey Constitution guarantees a defendant the right to a jury that is drawn from a representative cross-section of the community, in large part *because* of the "opinions, preconceptions, or even deep-rooted biases derived from their life experiences . . ." *Gilmore*, 103 N.J. at 524–25, quoting *Wheeler*, 583 P.2d at 755. An "overall impartiality" is thus created through the resulting interplay "of diverse beliefs and values the jurors bring from their group experiences." *Id*. at 525. By having F.G. arrested and removed from this amalgam of communities and experience, the prosecutor interrupted the achievement of "overall impartiality." The unnatural exclusion that occurred here "interdicted the mix of group experience thereby obstructing the goal of impartiality . . . [and] suppress[ing] the contribution of [F.G.'s] experience to

[9] Recognizing this, the New Jersey Legislature recently proposed legislation expanding the prohibition of preemptory strike juror disqualification based on various attributes of specific lived experiences, from the well-worn classes of race, sex, marital status, *etc*., to sexual orientation and gender identity, noting that none of those realities prevented an individual from being fair and impartial in carrying out the duties of a juror. S. 1920 (2018).

the jury's deliberative process." *State v. Townes*, 220 N.J. Super. 38, 45–46 (App. Div. 1987).

Further, as the Judiciary[10] has itself acknowledged, historic conditions of discrimination have resulted in the imposition of inequitable and discrepant punishment upon certain communities by the criminal justice system and law enforcement.[11] These conditions directly feed the overrepresentation of people of color in New Jersey's jails and prisons and should not now be used against jurors as "proof" of their inability to carry out their civic duties merely through association.[12]

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[10] *See, e.g.,* Statement of the New Jersey Supreme Court, June 5, 2020, available at https://www.njcourts.gov/pressrel/2020/pr060520a.pdf.

[11] *See* New Jersey Criminal Sentencing & Disposition Commission Annual Report, 4-5 (2019) ("[t]he Commission acknowledges a long and complicated history involving racial bias within New Jersey's criminal justice system. That history, and the evidence of racial disparity in New Jersey's incarceration of minorities, requires a serious, sustained examination that spans a range of issues from policing and *prosecution* to prison and parole.") (emphasis added), *available at* https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf; *see also* Danielle Zoellner, *New Jersey Cop Charged After Bodycam Footage Shows Him Using Pepper Spray on Young Black Men*, The Independent (June 12, 2020), https://www.independent.co.uk/news/world/americas/new-jersey-police-pepper-spray-black-men-bodycam-assault-a9563181.html.

[12] While the ACLU-NJ recognizes that this issue is not raised directly in this case, it should be noted that New Jersey is an outlier with regard to its restrictions on who may serve on juries based upon their criminal histories. *See* N.J.S.A. 2B:20-1(e) (requiring that jurors "shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States"). Many states do not require a total, lifetime ban on jury service where a juror may have been

CONCLUSION

For all the aforementioned reasons, this Court should affirm the holding of the Appellate Division reversing Mr. Andujar's conviction and remanding the matter for a new trial.

To prevent this tactic from becoming a routine abuse of power that would have a lasting chilling effect on communities particularly effected by racial disparities in New Jersey's criminal justice system, the Court should also provide a remedy should such actions occur again in the future, including, but not limited to: (1) reseating the wrongfully excused juror; (2) dismissing the jury panel and starting jury selection anew; or (3) ordering the forfeiture of one peremptory challenge from the party abusing the law enforcement powers.

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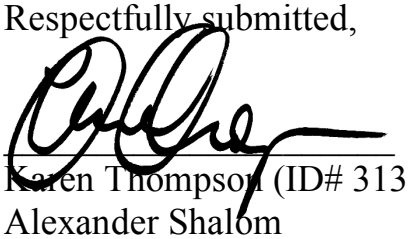
convicted of an indicatable offense within either the criminal or civil context. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U.L. REV. 65, 150-57 (2003) (detailing jury exclusion statues from around the nation). In fact, between 1995 and 1997, New Jersey allowed people with felony convictions to serve on juries after they had completed their sentences. *See id*. Regardless, criminal history restrictions—based in the idea that those with felony convictions are, by default biased—have been shown to be unsupported in fact. A recent mock-jury experiment included people with felony convictions and people without convictions. The participants with felony convictions displayed greater engagement and the quality of deliberations for all involved was not affected by the presence of members with convictions; furthermore, participants with felony convictions were also as likely to convict as those without. James M. Binnall, *Jury diversity in the age of mass incarceration: an exploratory mock jury experiment examining felon-jurors' potential impacts on deliberations*, Psych., Crime & Law (2018), *available at* https://www.motherjones.com/wp-content/uploads/2019/05/Psychology-Crime-and-Law-Article.pdf.

Respectfully submitted,



Karen Thompson (ID# 313662019)
Alexander Shalom
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1729

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. Edwin Andujar (A-6-20) (084167)

Argued March 30, 2021 -- Decided July 13, 2021

RABNER, C.J., writing for a unanimous Court.

In this appeal, the Court considers defendant Edwin Andujar's argument that he was denied the right to a fair trial because racial discrimination infected the jury selection process. In doing so, the Court addresses for the first time when a criminal history check can be run on a prospective juror.

The appeal centers on the selection process for F.G., a Black male from Newark. F.G. was questioned at sidebar for about a half hour. Throughout the questioning, F.G. told the court he believed he could be a fair and impartial juror.

F.G. volunteered that he had answers to multiple voir dire questions, including having two cousins in law enforcement and knowing "[a] host of people" who had been accused of crimes -- five or six close friends in all. In providing details about those accusations, F.G. used terms like "CDS" and "trigger lock." F.G. also told the court about three crime victims he knew. He said that two cousins had been murdered, and a friend had been robbed at gunpoint. F.G. was asked if anything he had said would have an impact on him as a juror. F.G. suggested that he, like every other juror, has a unique background and perspective, which is why defendants are judged by a group. After additional questions, F.G. was asked whether the criminal justice system was fair and effective; F.G. responded, "I believe so because you are judged by your peers."

The State challenged F.G. for cause and asked that he be removed. The prosecutor noted that F.G. "has an awful lot of background" and "uses all of the lingo about, you know, the criminal justice system." A second prosecutor voiced concern that F.G.'s "close friends hustle, engaged in criminal activity" because "[t]hat draws into question whether [F.G.] respects the criminal justice system" and his role as a juror.

Defense counsel stated that "it is not a hidden fact that living in certain areas you are going to have more people who are accused of crimes, more people who are victims of crime," and that "to hold it against [F.G.] that these things have happened . . . to people that he knows . . . would mean that a lot of people from Newark would not be able to serve."

The trial court denied the State's motion, explaining that "[e]verything [F.G.] said and the way he said it leaves no doubt in my mind that he . . . does not have any bias towards the State nor the defense . . . . I think he would make a fair and impartial juror."

After the court's ruling, the prosecution ran a criminal history check on F.G. The next day, the court explained the prosecutor "came to see me yesterday" and revealed that there were "warrants out for F.G." and that "[t]hey were going to lock him up." Defense counsel noted there was "one warrant out of Newark Municipal Court." Afterward, the State renewed its application to remove F.G. for cause. When the court asked for the defense's position, counsel responded, "I don't oppose[] the State's application."

Defense counsel expressed concern about tainting the jury and added, "I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants." The prosecutor replied that "the State is not in the habit of . . . looking at a random juror's" criminal history, and then reiterated concerns the State had voiced the day before to explain why it ran a background check. The prosecutor denied that racial bias played a role in the State's application to remove F.G. for cause. Defense counsel then placed on the record a "concern that the State doesn't typically check people out, but in this case, they did single someone out to check for warrants."

Defense counsel asked the court to award defendant one additional peremptory challenge. Counsel argued that the State had an unfair advantage in that it could access databases to run a criminal history check, but defendant could not; counsel also noted that the State's "target[ing]" of F.G. "implicates due process concerns . . . regarding [F.G.'s] rights to sit on a jury." The court denied the request. The jury convicted defendant.

The Appellate Division reversed and remanded for a new trial. 462 N.J. Super. 537, 563 (App. Div. 2020). The Court granted certification. 244 N.J. 170 (2020).

HELD: *Courts, not the parties, oversee the jury selection process. On occasion, it may be appropriate to conduct a criminal history check to confirm whether a prospective juror is eligible to serve and to ensure a fair trial. That decision, though, cannot be made unilaterally by the prosecution. Going forward, any party seeking to run a criminal history check on a prospective juror -- through a government database available only to one side -- must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge. The results of the check must be shared with both parties and the court, and the juror should be given an opportunity to respond to any legitimate concerns raised.

*That standard was not met here. Nor is there anything in the record that justified the State's decision to selectively focus on F.G. and investigate only his criminal record. Based on all of the circumstances, the Court infers that F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State,

which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can. Defense counsel raised multiple serious concerns but should have leveled a more precise objection. Nonetheless, the Court cannot ignore the evidence of implicit bias that appears in the extensive record. Under the circumstances, defendant's right to be tried by an impartial jury, selected free from discrimination, was violated. The Court therefore reverses his conviction and remands for a new trial.

*New Jersey today allows for the highest number of peremptory challenges in the nation -- more than double the national average -- based on a statute enacted in the late 1800s. Yet, as the United States Supreme Court acknowledged decades ago, peremptory challenges can invite discrimination. See Batson v. Kentucky, 476 U.S. 79, 96, 98 (1986). Although the law remains the same, our understanding of bias and discrimination has evolved considerably since the nineteenth century. And federal and state law have changed substantially in recent decades to try to remove discrimination from the jury selection process. See Batson, 476 U.S. 79; State v. Gilmore, 103 N.J. 508 (1986). It is time to examine the jury selection process -- with the help of experts, interested stakeholders, the legal community, and members of the public -- and consider additional steps needed to prevent discrimination in the way we select juries. The Court calls for a Judicial Conference on Jury Selection. The Conference will convene in the fall to assess this important issue and recommend improvements to our system of justice.

1. Prospective jurors are typically excused in two ways. The court can excuse jurors "for cause" when it appears that they would not be fair and impartial, that their beliefs would substantially interfere with their duties, or that they would not follow the court's instruction or their oath. Either party can challenge a juror for cause; the trial court can also act on its own. Both parties can also exercise peremptory challenges and remove a juror without stating a reason under N.J.S.A. 2B:23-13(b). Both the Federal and State Constitutions bar discrimination based on race in the jury selection process. (pp. 22-23)

2. Under the Equal Protection Clause of the United States Constitution, no citizen can be excluded from jury service on account of race. See Batson, 476 U.S. at 84. In Batson, the Supreme Court outlined an analytical framework to examine whether allegedly discriminatory peremptory challenges violated the Equal Protection Clause. Id. at 93-98. The New Jersey Constitution likewise guarantees defendants a "trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex." Gilmore, 103 N.J. at 524. That guarantee is rooted in Article I, Paragraphs 5, 9, and 10, which together provide defendants "the right to trial by a jury drawn from a representative cross-section of the community." Id. at 524. (pp. 23-27)

3. In Gilmore, the Court outlined an analytical framework to assess potentially discriminatory peremptory challenges. With certain refinements, the Court summarized the three-step process in State v. Osorio, 199 N.J. 486, 492-93 (2009): (1) the party contesting the peremptory challenge must carry the "slight" burden of "tender[ing]

sufficient proofs to raise an inference of discrimination" in the exercise of the challenge; (2) if that burden is met, then the party exercising the challenge must "prove a race- or ethnicity-neutral basis" for the challenge; and (3) the court must "determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias." The Court reviews guidance from case law applicable to each of the three steps, as well as the remedies available to respond to impermissible uses of peremptory challenges. (pp. 27-31)

4. Batson and Gilmore address purposeful racial discrimination in jury selection. Yet parties may not be aware of their own biases. Justice Marshall highlighted the concern of implicit bias in a concurring opinion in Batson: "A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." 476 U.S. at 106 (Marshall, J., concurring). From the standpoint of the State Constitution, it makes little sense to condemn one form of racial discrimination yet permit another. What matters is that juries selected to hear and decide cases are chosen free from racial bias -- whether deliberate or unintentional. (pp. 31-33)

5. The practice of running background checks on prospective jurors raises a question of first impression for the Court. Today, the State alone has the ability to unilaterally conduct such checks. The State represents that it is extremely rare for it to conduct background checks on prospective jurors. It relies on regulations promulgated by the Department of Law and Public Safety as the source of its authority. The Court does not question the State's good-faith belief that it had the authority to run the background check it conducted in this case. But administrative regulations generally may not govern the intricacies of jury selection any more than they could control other aspects of a trial. New Jersey case law on the issue is sparse, and other jurisdictions have reached varied conclusions on the subject. (pp. 34-39)

6. In providing guidance on this topic, the Court attempts to accommodate multiple interests: the overriding importance of selecting fair juries that are comprised of qualified, impartial individuals; the need for an evenhanded approach that applies to all parties; the need to guard against background checks prompted by actual or implicit bias; and the importance of having a process that respects the privacy of jurors and does not discourage them from serving. With those aims in mind, the Court relies on its supervisory power to outline a framework for conducting criminal background checks of jurors, detailed in Section IV.C. of the opinion. (pp. 39-42)

7. Here, "[t]he prosecutor presented no characteristic personal to F.G. that caused concern, but instead argued essentially that because he grew up and lived in a neighborhood where he was exposed to criminal behavior, he must have done something wrong himself or must lack respect for the criminal justice system." 462 N.J. Super. at

562. That argument, the Appellate Division observed, was not new, and historically stemmed from impermissible stereotypes about racial groups -- particularly Black Americans. Ibid. The trial court properly denied the State's challenge that F.G. be removed for cause. Ordinarily, the next step would have been for the State to exercise a peremptory challenge that defendant could have challenged under Batson and Gilmore. Instead, the State ran a criminal history check on F.G. -- a check that did not reveal any history that would disqualify F.G. from jury service. See N.J.S.A. 2B:20-1. By unilaterally running a criminal history check on F.G. and setting his arrest in motion, the State effectively evaded any Batson/Gilmore analysis. (pp. 42-47)

8. Although no formal Batson/Gilmore evaluation was conducted before the trial court, the detailed record reveals that the circumstances surrounding F.G.'s dismissal allowed for an inference that his removal was based on race -- which, again, is a slight burden to establish. F.G., a minority juror, answered all questions posed in a manner that led the trial judge to conclude "he would make a fair and impartial juror." The State's justifications for running the check and seeking F.G.'s removal did not rebut the inference of discrimination. In fact, the trial court had already considered and discounted the State's reasons when the court denied its motion to remove F.G. for cause. And throughout the appellate process, the State has not provided a convincing non-discriminatory reason for the steps it took to keep F.G. off the jury. Finally, the evidence in the record reveals, by a preponderance of the evidence, that F.G.'s removal and the background check that prompted it stemmed from impermissible presumed group bias. The Court does not find the trial prosecutors engaged in purposeful discrimination or any willful misconduct. The record here suggests implicit or unconscious bias on the part of the State. Defendant's constitutional right to be tried by an impartial jury, selected free from discrimination, was violated, and his conviction must be reversed. (pp. 47-49)

9. The Court considered implicit bias as part of the Gilmore analysis in this appeal. Except for defendant, this new rule of law will apply only to future cases. (p. 49)

10. New Jersey today provides far more peremptory challenges than any other state, based on a nineteenth-century law. But "there can be no dispute[] that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96. The Court asks the Director of the Administrative Office of the Courts to arrange for a Judicial Conference on Jury Selection to explore the nature of discrimination in the jury selection process. The Court invites the legal community as a whole to take part in a probing conversation about additional steps needed to root out discrimination in the selection of juries. (pp. 50-54)

AFFIRMED AS MODIFIED and REMANDED for a new trial.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-6 September Term 2020

084167

State of New Jersey,

Plaintiff-Appellant,

v.

Edwin Andujar,

Defendant-Respondent.

On certification to the Superior Court,
Appellate Division, whose opinion is reported at
462 N.J. Super. 537 (App. Div. 2020).

Argued	Decided
March 30, 2021	July 13, 2021

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Frank J. Ducoat and Emily M.M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the briefs).

Joseph J. Russo, Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender; attorney; Joseph J. Russo, Alison Perrone, First Assistant Deputy Public Defender, Kevin S. Finckenauer, Assistant Deputy Public Defender, of counsel and on the briefs, and John Douard, Assistant Deputy Public Defender, on the briefs).

Adam D. Klein, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Adam D. Klein, of counsel and on the brief).

Karen Thompson argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation, attorneys; Karen Thompson, Alexander Shalom, and Jeanne LoCicero, on the brief).

Raymond M. Brown argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, attorneys; CJ Griffin, of counsel and on the brief).

Jonathan Romberg argued the cause for amicus curiae Seton Hall University School of Law Center for Social Justice (Seton Hall University School of Law Center for Social Justice, attorneys; Jonathan Romberg, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

In this appeal, defendant argues he was denied the right to a fair trial because racial discrimination infected the jury selection process. The Appellate Division reversed defendant's conviction on that ground, and we modify and affirm the court's judgment. In doing so, we address for the first time when a criminal history check can be run on a prospective juror.

The appeal centers on the selection process for F.G., a Black male from Newark who was summoned for jury service. The prosecution questioned F.G.

extensively about people he knew who had been accused of crimes, or were victims of crimes, and then asked the trial judge to remove him for cause. The State argued that F.G.'s background, associations, and knowledge of the criminal justice system were problematic, and also suggested that F.G. had been evasive. The trial judge rejected the challenge and found F.G. "would make a fair and impartial juror."

Relying on the same reasons the trial judge did not accept, the State chose to run a criminal history check on F.G. It did not investigate any other prospective jurors in that way.

The prosecution promptly notified the trial judge and defense counsel of what the background check revealed: F.G. had two prior arrests that did not result in a conviction and an outstanding municipal court warrant for simple assault. Nothing in the results disqualified F.G. from serving as a juror.

By the time court resumed the next day, however, the prosecution had already taken steps to arrange for F.G.'s arrest. After further discussion in court, he was removed from the jury panel and arrested. The outstanding charges against him were dropped two months later.

Courts, not the parties, oversee the jury selection process. On occasion, it may be appropriate to conduct a criminal history check to confirm whether a prospective juror is eligible to serve and to ensure a fair trial. That decision,

though, cannot be made unilaterally by the prosecution. Going forward, we direct that any party seeking to run a criminal history check on a prospective juror must present a reasonable, individualized, good-faith basis for the request and obtain permission from the trial judge. We refer to a check of a government database that is available to only one side. The results of the check must be shared with both parties and the court, and the juror should be given an opportunity to respond to any legitimate concerns raised.

That standard was not met here. Nor is there anything in the record that justified the State's decision to selectively focus on F.G. and investigate only his criminal record. Based on all of the circumstances, we infer that F.G.'s removal from the jury panel may have stemmed from implicit or unconscious bias on the part of the State, which can violate a defendant's right to a fair trial in the same way that purposeful discrimination can.

We require defense counsel to make precise, timely objections during jury selection. Here, counsel raised multiple serious concerns but should have leveled a more precise objection. Nonetheless, we cannot ignore the evidence of implicit bias that appears in the extensive record. Under the circumstances, we find that defendant's right to be tried by an impartial jury, selected free from discrimination, was violated. We therefore reverse his conviction and remand for a new trial.

This appeal highlights the critical role jury selection plays in the administration of justice. It also underscores how important it is to ensure that discrimination not be allowed to seep into the way we select juries. Potential jurors can be removed for cause if it appears they cannot serve fairly and impartially. The parties can also strike individual jurors, without giving a reason, by exercising peremptory challenges. N.J.S.A. 2B:23-13(b).

New Jersey today allows for the highest number of peremptory challenges in the nation -- more than double the national average -- based on a statute enacted in the late 1800s. Yet, as the United States Supreme Court acknowledged decades ago, peremptory challenges can invite discrimination. See Batson v. Kentucky, 476 U.S. 79, 96, 98 (1986).

Although the law remains the same, our understanding of bias and discrimination has evolved considerably since the nineteenth century. And federal and state law have changed substantially in recent decades to try to remove discrimination from the jury selection process. See Batson, 476 U.S. 79; State v. Gilmore, 103 N.J. 508 (1986).

It is time to examine the jury selection process -- with the help of experts, interested stakeholders, the legal community, and members of the public -- and consider additional steps needed to prevent discrimination in the way we select juries. We therefore call for a Judicial Conference on Jury

Selection. The Conference will convene in the fall to assess this important issue and recommend improvements to our system of justice.

I.

A.

Defendant Edwin Andujar was accused of killing his roommate in August 2014 by stabbing him twelve times with a knife. At trial, a neighbor from the apartment downstairs testified that she heard a noise, ran upstairs, and saw defendant holding a bloody knife next to the victim. The victim was in a wheelchair at the time. The neighbor heard the victim exclaim that defendant had stabbed him and was killing him. She then ran downstairs and called 9-1-1. When a police officer arrived, defendant reportedly said, "I stabbed him, I couldn't take it anymore."

Defendant testified that his roommate had told him he had to move out of the apartment and then came at him with a knife. Defendant claimed he took the knife during a struggle and then swiped at the victim and stabbed him in an effort to get the victim off of him. Defendant said he never meant to hurt the victim, who was a friend.

Five days later, after several surgeries, the victim died from his wounds. In June 2017, a jury convicted defendant of first-degree murder and two

weapons offenses. He was sentenced to forty-five years in prison with a period of parole ineligibility of approximately thirty-eight years.

B.

According to the State, jury selection in this case lasted eight days; the record contains only two days of transcripts. On May 31, 2017, F.G., a prospective juror, was questioned at sidebar for about a half hour. More than thirty pages of the transcript from that day relate to him. Throughout the questioning, F.G. told the court he believed he could be a fair and impartial juror.

F.G. volunteered that he had answers to multiple voir dire questions, which the court carefully reviewed one by one. F.G. first relayed that he had two cousins in law enforcement -- "a Newark cop and . . . an Irvington cop." He said that he did not discuss their work with them and that those relationships would not interfere with his ability to serve on the jury.

F.G. next responded to this question: "Have you, any family member, or close friend ever been accused of committing an offense other than a minor motor vehicle offense?" He reported that he knew "[a] host of people" who had been accused of crimes -- five or six close friends in all.

One had been accused of selling what F.G. referred to as "CDS" -- a controlled dangerous substance -- five or six months before in Newark. F.G.

did not know the details of the case aside from the outcome: "[T]hey get locked up after that it ain't got nothing to do with it." F.G. had gone to high school with the person and believed he had been treated fairly. F.G. did not know whether the individual was still in jail because F.G. had "moved away."

A second friend had also been charged with selling drugs in Newark the prior summer. F.G. assumed the result was the same as the first matter. He explained he had no impression whether the second person had been treated fairly, noting, "[h]onestly, I don't have any problem as long as I stay out of it."

F.G. believed the third person sold a "CDS" together with the second individual and assumed both had been treated fairly. He did not know the details of the cases and told the court, "I don't get into their case. I don't get into their business."

A fourth friend had been charged with gun possession about seven years before in Newark. F.G. assumed he had been found guilty "[b]ecause he went away for some years." F.G. added, "I don't know if he pleaded guilty. All I know he got trigger locked and he went away."[1] F.G. saw the person when he

[1] Since the 1990s, federal prosecutors and agencies have partnered with state and local law enforcement to investigate and prosecute firearms offenses as part of a gun violence reduction strategy. Among other names, the program has been known as "Project Triggerlock" and "Operation Triggerlock." See U.S. Dep't of Just., Summary of District Gun Violence Reduction Strategies, https://www.justice.gov/archive/opd/AppendixA.htm (last visited July 7, 2021).

came home again but did not speak with him about the offense or how he thought he had been treated. In response to a follow-up question, F.G. said, "I know he had three gun charges. I know after the third one he went to the feds." When asked about his familiarity with the term "trigger lock," F.G. explained, "I'm familiar with it. I grew up in a neighborhood where it just ain't good. You learn a lot of things from the streets."

F.G. did not recall "[a]nybody else charged." He then told the court about three crime victims he knew. He said that two cousins had been murdered. One was stabbed to death in Newark about fifteen years earlier. The person accused of the crime was acquitted at trial. F.G. said he was upset by the verdict but did not have any resentment toward the criminal justice system. He added that he stayed away and wanted no part of the matter.

Another cousin had been shot to death a year or two afterward in Kentucky. The accused in that case went to trial and was convicted. Both matters involved domestic disputes.

The third victim, a friend of F.G.'s, had been robbed at gunpoint in Newark two years ago. No one was charged in the case. When asked what he thought about that, F.G. responded, "[a] lot of my friends live that lifestyle, so I think it just come with the territory."

The court then asked F.G. if "the fact that you know a lot of people who are accused of crimes and lot of people who are victim[s] of crimes . . . would make you a better juror than someone who hasn't had that kind of experience in their life." F.G. responded, "No." When asked if anything he had said so far would have an impact on him as a juror and on the way he would view the evidence, F.G. said, "the same as anybody else, background would affect them." In response to a question, he later clarified his answer:

> What I was saying was, like, everybody in here, jurors and everybody, got a background. And, you know, this is different, that is why you getting judged by what 14, 13, and everybody got different perspectives about everything.
>
> So, you know, what I'm saying, mine's might be a little different than the next person. The next person's might be little different according to where they grew up and how they grew up.

F.G. also clarified his comment about the "lifestyle" his friends lived: "A lot of my -- a lot of friends I grew up in neighborhood, they hustle, they selling drugs; that is what I meant by the lifestyle."

In response to the balance of the jury questionnaire, F.G. explained that he worked for the Department of Public Works in East Orange. Previously, he had been a security guard at high schools in Newark for about ten years and a postal worker. F.G. added that he attended but did not finish college, and he coached football in Newark in his spare time.

For the final question -- whether the criminal justice system was fair and effective -- F.G. responded, "I believe so because you are judged by your peers."

C.

After the above exchange, the State challenged F.G. for cause and asked that he be removed. The prosecutor offered the following justification:

> He has an awful lot of background. He says that he wants no parts of any of this, but he has a host, using his own language, of friends and family that have been accused of crimes, same as being victims.
>
> But when asked to give a number, he just kind of guessed at the number, Judge, he gave us a number that would satisfy us, the State submits. And I just felt that there is more people that he knows are accused and even more that could be victims. I think on a case like this he has had two cousins that were murdered, one was involved in a stabbing and a domestic dispute. It sort of mirrors the facts of this case. It is a risk to take a chance on somebody that might have a, you know, problem with his cousin getting murdered in a domestic dispute when we have the same set of facts in this case almost mirroring it.
>
> You know, he has -- he uses all of the lingo about, you know, the criminal justice system, talked about people getting picked up, talked about people getting trigger locked, talked about CDS, talks about the lifestyle. I just think that given his background and his extensive background in the criminal justice system with friends and family and knowing what the testimony in this case is going to be is problematic. And I think the juror should be excused for cause based on his answers to those questions.

A second prosecutor then added,

> What I think is very concerning his close friends hustle, engaged in criminal activity. That is how his friends make a living. That draws into question whether he respects the criminal justice system, whether he respects what his role is here, and whether he is going to uphold all of the principles that he was instructed by your Honor.
>
> Additionally, I don't think that he was as forthcoming about his knowledge of the system. I know towards the end after probing by counsel and by your Honor, he did admit he knew a term such as "trigger locking" and the way things worked. But in the beginning he seemed to just be not forthcoming, no, I don't really know, I know they are locked up, I don't hear anything. I don't think he was being fully honest.

In response, defense counsel called "the State's position . . . untenable in the sense that it means that no black man in Newark would be able to sit on this jury." When challenged by the prosecution, defense counsel took back her comment about race and continued,

> The people that he is around, because of where he lives, the socioeconomic status of those people, their interactions with the criminal justice system, it is not a hidden fact that living in certain areas you are going to have more people who are accused of crimes, more people who are victims of crime. I think he was very patient with us and went through the people that he could remember.
>
> The fact that he said things like you get picked up, uhmm, that is just a fact of his life. He was the one who volunteered the word or the term "trigger locked."

> He explained that he knew that term. It is not that he is part of this milieu if we will use that term.
>
> And he also mentioned that, a lot of my friends live that lifestyle. But he also, you know, when he was explaining that, he says that he likes to stay out of it, he doesn't like to involve himself in that. So I think to hold it against him that these things have happened around him to happen to people that he knows is not a position that I think your Honor should entertain, because I think it would mean that a lot of people from Newark would not be able to serve.

The trial court then rejected the State's motion and explained,

> I don't think there has been any reason at all that this juror should be excused for cause.
>
> Everything he said and the way he said it leaves no doubt in my mind that he's not expressed or does not have any bias towards the State nor the defense for anything. What he said, how he said it. I think he would make a fair and impartial juror. I don't have any reason to doubt it, so that application is denied.

D.

After the court's ruling, the prosecution ran a criminal history check on F.G. On the next day of jury selection, June 1, 2017, the court explained the prosecutor "came to see me yesterday afternoon" and revealed that F.G. "had been arrested before. He had warrants out for him. They were going to lock him up." The court noted the State provided incident reports and some printouts as corroboration. The judge also stated that he had directed the prosecutor "to tell [defense counsel] the same thing."

Defense counsel corrected the record and noted there was "one warrant out of Newark Municipal Court." Afterward, the State renewed its application to remove F.G. for cause. When the court asked for the defense's position, counsel responded, "I don't oppose[] the State's application."

Much of the discussion that immediately followed focused on how to avoid having F.G.'s arrest taint the jury pool. The prosecution represented that F.G. would not be arrested in the jury's presence. The prosecutor revealed the following as well: that she had disclosed the information to a sergeant to "contact[] Newark fugitive"; and that she "made a call this morning to find out if, in fact, he was apprehended to avoid him having to come here." In other words, before the discussion in court on June 1, the prosecution had taken steps to have the prospective juror arrested on a municipal court warrant.

To avoid any taint, the court suggested it would bring all the jurors into the courtroom and excuse F.G. Once he returned to the first floor of the courthouse, law enforcement would take over.

The following exchange occurred during that discussion. Defense counsel expressed concern about tainting the jury and added, "I think coming to court for jury service no one expects they are going to be looked up to see if they have warrants."

The prosecutor replied, "just so the record is clear, the State is not in the habit of doing what counsel just suggested where we are looking at a random juror's" criminal history. The prosecutor then reiterated concerns the State had voiced the day before to explain why it ran a background check: F.G.'s "background and his acknowledgment that he hangs out with people that are in a lifestyle and hustling drugs and getting arrested, the dozens of criminal elements that he produced here at sidebar raised the concern for the State."

The prosecutor again denied that racial bias played a role in the State's application to remove F.G. for cause. After the request had been denied the day before, the prosecutor stated, "[w]e did do a look up on him. He turned up to have an open warrant . . . plus additional arrests in the past, both for domestic violence where it seems he has an alleged habit of beating up women."[2]

Defense counsel then placed on the record a

> concern that the State doesn't typically check people out, but in this case, they did single someone out to check for warrants. I think that is a concern, and I don't know what the remedy is for that. But it is troubling that this person, this potential juror was singled out.

After a short recess, during which defense counsel consulted her office, she asked the court to award defendant one additional peremptory challenge.

[2] The record on appeal contains no support for this statement.

Counsel argued the State had an unfair advantage in that it could access databases to run a criminal history check, but defendant could not. According to defendant, "[t]he State clearly would have used a peremptory strike for this potential juror" for the reasons they expressed at sidebar; instead, they "used their resources" and did not have to "use a peremptory strike." An additional peremptory challenge, counsel argued, would partly "fix that imbalance." It would not, however, "address the concern that the State is record checking people that they don't like." In response to a question from the court, defense counsel confirmed that the only remedy she sought was an additional peremptory challenge.

The prosecution opposed the request, and the court reserved decision on the issue. The judge then brought the jury panel into the courtroom and excused F.G., as planned.

The court later heard additional argument from the parties. Defense counsel again noted the unfairness of allowing one side to conduct background checks when the other could not, and added that the State "selectively target[ed] one potential juror and look[ed] up information about that potential juror. They didn't have to do that. They chose to do that. They targeted that juror. I think it implicates due process concerns. It implicates constitutional

concerns regarding that person's rights to sit on a jury." Counsel submitted that F.G. had no criminal convictions and could sit on a jury.

In addition, counsel argued that there was no evidence that F.G. knew about the prior charges, so it did not appear that he was dishonest by not revealing them to the court. To the contrary, counsel argued, F.G. continued to show up for jury duty, which suggested he did not know about the outstanding bench warrant.

The State argued that F.G. had an open warrant for his arrest, had been processed, and was no longer available to serve as a juror. The State also observed that defense counsel had consented to the renewed challenge for cause.

Defense counsel disagreed. "I believe I deferred to the court with the understanding that he was going to be arrested. . . . I did put my opposition to the fact that he was going to be arrested. I still don't think that that is the correct way to have dealt with this." The court then reviewed counsel's earlier response and noted she had not objected.

Later the same day, the court denied defendant's application for an additional peremptory challenge. The court again observed "that defense [counsel] did not object to [F.G.] being excused for cause." Nor did defendant present "any controlling authority" that "dictate[d] the defense should receive

an extra challenge." At the end of the process, the State had one peremptory challenge left and defendant had two. As noted earlier, after the jury considered the evidence, it convicted defendant.

E.

Defendant appealed. The Appellate Division reversed his conviction and remanded the matter for a new trial. State v. Andujar, 462 N.J. Super. 537, 563 (App. Div. 2020).

The court initially confirmed that defendant had properly preserved a challenge to the composition of the jury. Id. at 549-51. The Appellate Division did "not reach the question whether a criminal record check is authorized during jury voir dire" but recommended that a more complete record be made in such an instance. Id. at 555. The court added that "the State should not have undertaken . . . measures that . . . render[ed] a seated juror unavailable without leave of court." Ibid.

The Appellate Division noted that an analysis should have been done under the Batson/Gilmore framework, which we discuss later, and that defendant could have presented a prima facie case of discrimination relating to the State's treatment of F.G. -- a member of a protected group who alone "was subjected to a record check." Id. at 561-62.

Based on the record, the Appellate Division could not "determine with certainty whether the prosecutor applied her reasons" for challenging F.G. "evenhandedly to all prospective jurors." Id. at 562. Nonetheless, "relief [was] available to rectify the matter," and the Appellate Division found the trial court "could have refused to grant a dismissal for cause even in the face of the juror's potential arrest . . . on a municipal warrant." Id. at 563.

Because the trial "court made no findings of fact concerning the prosecution's selective use of a criminal record check and granted no relief to the defense," the Appellate Division reversed defendant's conviction and remanded the case for a new trial. Ibid.

We granted the State's petition for certification. 244 N.J. 170 (2020). We also granted leave to the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), the Association of Criminal Defense Lawyers of New Jersey (ACDL), and the Seton Hall University School of Law Center for Social Justice (CSJ) to participate as friends of the Court.

II.

The State contends that prosecutors may conduct criminal history checks of prospective jurors based on N.J.A.C. 13:59-2.1(a). The State also asserts that it moved to strike F.G. for cause based on race-neutral reasons, including information learned during the background check it ran. Defendant cannot

establish a prima facie case of discrimination under the circumstances, according to the State. And if he could, the State maintains, it is essential to hold a hearing pursuant to Batson/Gilmore. The State therefore submits that defendant's conviction should be reinstated or, in the alternative, that the matter should be remanded to the trial court for a hearing.

The Attorney General focuses in particular on criminal history checks. The Attorney General maintains that prosecutors should be able to access a juror's criminal history if they reasonably believe it may cast doubt on the person's ability to serve impartially; if challenged, "prosecutors . . . must be able to articulate a legitimate, good-faith belief why" the record check was appropriate. The Attorney General also proposes that best practices be adopted for the rare occasions when records checks are conducted.

Defendant counters that prosecutors do not, and should not, have the authority to perform independent criminal background checks on jurors. Such investigations, defendant asserts, will discourage jury service and likely have a disproportionate effect on Black Americans. Defendant argues that the State's actions amounted to a colorable claim of discrimination for which the only viable remedy at this time is the reversal of his conviction. Defendant also submits that the Batson/Gilmore framework should be modified to include an

"objective observer" standard in order to address the test's shortcomings. See State v. Jefferson, 429 P.3d 467, 480 (Wash. 2018).

The ACLU contends that the State's selective use of a criminal background check denied defendant his constitutional right to equal protection of the law and to a trial by a jury comprised of a fair cross-section of the community. The organization also asks the Court to impose new rules to protect jurors from unwarranted criminal history checks.

The ACDL maintains that this case shows how prosecutors can evade review under Batson/Gilmore and why reforms are needed to the jury selection process. The group points to potential changes to combat implicit bias and urges the Court to exercise its supervisory powers to prevent the State from conducting background checks on jurors.

The CSJ contends that discriminatory background checks on prospective jurors violate the State Constitution; that the State violated Gilmore because the case's underlying principles extend to background checks; that implicit bias is a form of racially disparate treatment; and that the Court should adopt new rules to protect against bias in jury selection.

III.

Because of the manner in which jury selection unfolded in this case, defendant and amici contend that F.G.'s removal inappropriately evaded

review under Batson and Gilmore. Those cases involve peremptory challenges.

Prospective jurors who are otherwise qualified to serve are typically excused in two ways. The court can excuse jurors "for cause" when it appears that they would not be fair and impartial, that their beliefs would substantially interfere with their duties, or that they would not follow the court's instruction or their oath. State v. Simon, 161 N.J. 416, 465 (1999); State v. DiFrisco, 137 N.J. 434, 460 (1994). Either party can challenge a juror for cause; the trial court can also act on its own. Both parties can also exercise peremptory challenges and remove a juror without stating a reason under N.J.S.A. 2B:23-13(b).

To provide relevant context, we start with an overview of the case law and principles relating to jury service and the selection process.

A.

Among the most important responsibilities we have as citizens is the obligation to serve on a jury. Jury service provides a "substantial opportunity . . . to participate in the democratic process." Flowers v. Mississippi, 588 U.S. ___, 139 S. Ct. 2228, 2238 (2019). It also "guards the rights of the parties" and fosters respect for the law. Powers v. Ohio, 499 U.S. 400, 407 (1991). Bringing together a diverse group of jurors with different life experiences and

insights not only preserves "the right to trial by a jury drawn from a representative cross-section of the community" but also helps achieve impartiality. Gilmore, 103 N.J. at 524-25.

Both the Federal and State Constitutions bar discrimination based on race in the jury selection process. The challenge is how to implement that mandate effectively.

1.

Under the Equal Protection Clause, no citizen can "be excluded from jury service on account of . . . race." Powers, 499 U.S. at 407; see Batson, 476 U.S. at 84; U.S. Const. amend. XIV, § 1. The Clause "forbids" prosecutors from challenging potential jurors based solely on their race. Batson, 476 U.S. at 89. Although jurors do "not have a right to sit on any particular . . . jury," they do "possess the right not to be excluded from one on account of race." Powers, 499 U.S. at 409. And a defendant is denied "equal protection of the laws when . . . [placed] on trial before a jury from which members of his race have been purposefully excluded" on the basis of race. Batson, 476 U.S. at 85 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

Those principles have evolved over time. Strauder set forth basic concepts against discrimination more than a century ago when the Supreme Court struck down a state law that allowed only "white male persons" to serve

on juries. 100 U.S. at 305, 310. Yet discrimination in jury selection continued long after in a "more covert" way -- "often accomplished through peremptory challenges in individual courtrooms rather than by blanket operation of law." Flowers, 588 U.S. at ___, 139 S. Ct. at 2240.

In Swain v. Alabama, decided eighty-five years after Strauder, the Supreme Court observed that "purposeful discrimination [could] not be assumed" and imposed a high burden on defendants to establish a constitutional violation. 380 U.S. 202, 205 (1965). The Court, in particular, "held that a defendant could not object to the State's use of peremptory strikes in an individual case," Flowers, 588 U.S. at ___, 139 S. Ct. at 2240, and that prosecutors were not required to explain their reasons for challenging jurors in a given case, Swain, 380 U.S. at 222.

Two decades later, the Court's decision in Batson overruled parts of Swain. Batson, 476 U.S. at 92-93; see also Flowers, 588 U.S. at ___, 139 S. Ct. at 2240. Batson recognized that "prosecutors' peremptory challenges [were then] largely immune from constitutional scrutiny" because "the teaching of Swain" had led trial courts to place "a crippling burden of proof" on defendants. 476 U.S. 92-93. The Court went on to outline an analytical framework to examine whether allegedly discriminatory peremptory challenges violated the Equal Protection Clause.

Under Batson, defendants must first establish "a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Id. at 93-94. The burden then "shifts to the State to come forward with a neutral explanation for" the peremptory challenge. Id. at 97. Next, the trial judge decides whether "the defendant has established purposeful discrimination." Id. at 98. In doing so, the court "must determine whether the prosecutor's stated reasons were the actual reasons or instead were a pretext for discrimination." Flowers, 588 U.S. at ___, 139 S. Ct. at 2241.

The Supreme Court reaffirmed the above standard in Powers and Flowers. Powers explained that it is not necessary for the defendant and the excluded juror to be of the same race in order to assert a Batson challenge, 499 U.S. at 406, and that a defendant has standing to raise equal protection claims on behalf of jurors who are excluded because of their race, id. at 415.

Flowers noted, among other things, "that disparate questioning can be probative of discriminatory intent." 588 U.S. at ___, 139 S. Ct. at 2247. As the Court observed,

> [d]isparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. In other words, by asking a lot of questions of the black prospective jurors or

> conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason -- any reason -- that the prosecutor can later articulate to justify what is in reality a racially motivated strike.
>
> [Id. at 2247-48 (citation omitted).]

The Court added that "disparate questioning or investigation alone does not constitute a Batson violation," but it can, "along with other evidence, inform the trial court's evaluation of whether discrimination occurred." Id. at 2248.

Flowers also underscored certain basic principles. The Supreme Court observed that "even a single instance of race discrimination against a prospective juror is impermissible" under the Equal Protection Clause. Id. at 2242. And the Court reaffirmed that "[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process." Ibid.

2.

The New Jersey Constitution likewise guarantees defendants a "trial by an impartial jury without discrimination on the basis of religious principles, race, color, ancestry, national origin, or sex." Gilmore, 103 N.J. at 524. That guarantee is rooted in Article I, Paragraphs 5, 9, and 10 of the State Constitution, which provide as follows: "No person shall be denied the enjoyment of any civil . . . right, nor be discriminated against in the exercise of any civil . . . right, . . . because of religious principles, race, color, ancestry or

national origin," N.J. Const. art. I, ¶ 5; "The right of trial by jury shall remain inviolate," N.J. Const. art. I, ¶ 9; and "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury," N.J. Const. art. I, ¶ 10; Gilmore, 103 N.J. at 524.

Those guarantees together provide defendants "the right to trial by a jury drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 524. That principle is meant to promote impartiality, by having jurors with "diverse beliefs and values" interact, and to enhance public respect for the court process. Id. at 525 (quoting People v. Wheeler, 583 P.2d 748, 761 (Cal. 1978)).

Two months after Batson was decided, this Court in Gilmore outlined a similar analytical framework to assess potentially discriminatory peremptory challenges. The Court anchored its decision to the State Constitution, which it noted provides greater protection for individual rights than the Federal Constitution. Id. at 522-23.

With certain refinements, the Court later summarized the three-step process in State v. Osorio:

> Step one requires that, as a threshold matter, the party contesting the exercise of a peremptory challenge must make a prima facie showing that the peremptory challenge was exercised on the basis of race or ethnicity. That burden is slight, as the challenger need only tender sufficient proofs to raise an inference of

> discrimination. If that burden is met, step two is triggered, and the burden then shifts to the party exercising the peremptory challenge to prove a race- or ethnicity-neutral basis supporting the peremptory challenge. In gauging whether the party exercising the peremptory challenge has acted constitutionally, the trial court must ascertain whether that party has presented a reasoned, neutral basis for the challenge or if the explanations tendered are pretext. Once that analysis is completed, the third step is triggered, requiring that the trial court weigh the proofs adduced in step one against those presented in step two and determine whether, by a preponderance of the evidence, the party contesting the exercise of a peremptory challenge has proven that the contested peremptory challenge was exercised on unconstitutionally impermissible grounds of presumed group bias.
>
> [199 N.J. 486, 492-93 (2009).]

The updated standard modified Gilmore's first step. Rather than presume the constitutionality of a peremptory challenge and require a defendant to show there was "a substantial likelihood" the challenge was based on group bias, see Gilmore, 103 N.J. at 535-36, Osorio made clear that challengers need only present "sufficient proofs to raise an inference of discrimination," 199 N.J. at 492. Osorio imported that change from Johnson v. California, 545 U.S. 162, 170-72 (2005) ("[A] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred."). The revised standard is "far less exacting." Osorio, 199 N.J. at 502.

Gilmore identified a number of factors courts can consider to assess whether a defendant has made a prima facie showing:

> (1) [whether] the prosecutor struck most or all of the members of the identified group from the venire; (2) [whether] the prosecutor used a disproportionate number of his or her peremptories against the group; (3) [whether] the prosecutor failed to ask or propose questions to the challenged jurors; (4) [whether] other than their race, the challenged jurors are as heterogenous as the community as a whole; and (5) [whether] the challenged jurors, unlike the victims, are the same race as defendant.
>
> [See Osorio, 199 N.J. at 503-04 (quoting State v. Watkins, 114 N.J. 259, 266 (1989)).]

The factors, of course, apply to challenges by either side. See Georgia v. McCollum, 505 U.S. 42, 59 (1992); State v. Andrews, 216 N.J. 271, 273 (2013). No party in a criminal or civil case can use peremptory challenges to remove a juror on the basis of race or gender. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991); J.E.B. v. Ala. ex rel. T.B., 511 U.S. 127, 130-31 (1994); Andrews, 216 N.J. at 273.

To carry its burden on step two, a party "must articulate clear and reasonably specific explanations of its legitimate reasons for exercising each of the peremptory challenges." Osorio, 199 N.J. at 504 (quoting Gilmore, 103 N.J. at 537). Trial judges must be mindful that unexplained "hunches" and "gut reactions" "may be colloquial euphemisms for the very prejudice that

constitutes impermissible presumed group bias or invidious discrimination." Gilmore, 103 N.J. at 539.

For the final step, the trial court must balance "whether the proffered explanations are 'genuine and reasonable grounds'" to remove biased jurors or simply "sham excuses." Osorio, 199 N.J. at 504-05 (quoting Gilmore, 103 N.J. at 537-38).[3]

Trial judges can select from a number of remedies to respond to "impermissible uses of peremptory challenges," such as

> dismissing the empaneled jury member(s) and the venire and beginning jury selection anew; reseating the wrongfully excused juror(s); reseating the wrongfully excused juror(s) and ordering forfeiture by the offending party of his or her improperly exercised peremptory challenge(s); permitting trial courts to require challenges to prospective jurors outside the presence of the jury; granting additional peremptory challenges to the aggrieved party, particularly when wrongfully dismissed jurors are no longer available; or a combination of these remedies as the individual case requires.
>
> [Andrews, 216 N.J. at 293.]

[3] Defendant asks the Court to replace the subjective inquiry in Batson's final step with a "objective observer" test. See Jefferson, 429 P.3d at 470 (holding the trial court must ask, for Batson's third step, "whether an objective observer could view race or ethnicity as a factor in the use of the peremptory strike"). We refer that question to the Judicial Conference on Jury Selection discussed in Section VII.

The remedy chosen "must assure a fair trial to all and eliminat[e] . . . the taint of discrimination." Ibid.

B.

Batson and Gilmore address purposeful racial discrimination in jury selection. 476 U.S. at 93-94; 103 N.J. at 537. Yet parties may not be aware of their own biases.

Although individuals may not be willing to admit they harbor racial bias, "[e]xplicit . . . bias is consciously held." State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019). Implicit or unconscious bias is different. "Implicit bias refers to . . . attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." Cheryl Staats et al., Kirwan Inst. for the Study of Race and Ethnicity, Implicit Bias app. at 62 (2015), http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf. Such biases "encompass both favorable and unfavorable assessments, [and] are activated involuntarily and without an individual's awareness or intentional control." Ibid. In other words, a lawyer or self-represented party might remove a juror based on an unconscious racial stereotype yet think their intentions are proper.

Justice Marshall highlighted this concern in a concurring opinion in Batson: "A prosecutor's own conscious or unconscious racism may lead him

easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically." 476 U.S. at 106 (Marshall, J., concurring). In this appeal, counsel likewise cite articles about the danger of implicit bias in jury selection.

It is important for the New Jersey Judiciary to focus with care on issues related to implicit bias. They include an array of legal questions worthy of attention, and we outline a process to address them in Section VII. For now, we simply recognize that implicit bias is no less real and no less problematic than intentional bias. The effects of both can be the same: a jury selection process that is tainted by discrimination.

From the standpoint of the State Constitution, it makes little sense to condemn one form of racial discrimination yet permit another. What matters is that juries selected to hear and decide cases are chosen free from racial bias -- whether deliberate or unintentional. Gilmore's reasoning, therefore, logically extends to efforts to remove jurors on account of race either when a party acts purposely or as a result of implicit bias. In both instances, a peremptory challenge can violate the State Constitution, depending on the circumstances.

As in Gilmore, our conclusion rests on the State Constitution, which in some settings affords greater protection for individual rights than the Federal

Constitution. 103 N.J. at 522-23; cf. Jefferson, 429 P.3d at 470; see also State v. Saintcalle, 309 P.3d 326, 335-37 (Wash. 2013).

C.

The courts, not the parties, oversee jury selection. See Pellicer v. Saint Barnabas Hosp., 200 N.J. 22, 40 (2009) ("The chief responsibility for conducting jury selection rests with the trial judge." (quoting State v. Wagner, 180 N.J. Super. 564, 567 (App. Div. 1981))).

Various statutes address the court's administration of the jury selection process. See, e.g., N.J.S.A. 2B:20-3 to -9, -11, -13, -15 (noting the Assignment Judge's role relating to questionnaires, selection, certification, summoning, excuses, and discharge of jurors); N.J.S.A. 2B:23-2, -3, -10, -14 (setting forth the court's role relating to the selection, empanelment, examination, and challenging of petit jurors); see also In re Supervision & Assignment of Petit Jury Panels, 60 N.J. 554, 559-62 (1972). In addition, Rule 1:8-3(a) directs judges to question prospective jurors. In the court's discretion, the parties may supplement the court's questions. R. 1:8-3(a).

Of particular note here, "the job of enforcing Batson rests first and foremost with trial judges." Flowers, 588 U.S. at ___, 139 S. Ct. at 2243. They have "the primary responsibility to . . . prevent racial discrimination from seeping into the jury section process." Ibid.

IV.

The practice of running background checks on prospective jurors raises a question of first impression for the Court.

A.

All parties have an interest in seating "as impartial a jury as possible." State v. McCombs, 81 N.J. 373, 375 (1979). Collectively, the court and counsel must strive to ensure the selection of jurors who are unbiased and will search for the truth.

The process of voir dire -- of questioning prospective jurors -- is intended to identify and exclude people who cannot be impartial. To that end, trial judges pose a mix of pointed and open-ended questions to elicit relevant information from prospective jurors. Administrative Directive #4-07: Jury Selection -- Model Voir Dire Questions -- Revised Procedures and Questions (May 16, 2007).

The process must also be respectful of jurors who do not expect that by appearing for jury duty, they will be subject to a criminal history check. See State v. Bessenecker, 404 N.W.2d 134, 138 (Iowa 1987). If that were the case, many qualified jurors would be less willing to serve, and some might not appear altogether.

Today, the State alone has the ability to unilaterally conduct criminal history checks on prospective jurors. Although defendants may search for public information that is available online, they cannot access official databases with the most accurate data. Under the current system, therefore, both sides do not operate under the same set of rules.

The State represents that it is extremely rare for it to conduct background checks on prospective jurors. It relies on regulations promulgated by the Department of Law and Public Safety as the source of its authority. The regulations restrict "[a]ccess to criminal history record information for criminal justice purposes . . . to criminal justice agencies." N.J.A.C. 13:59-2.4(a) (emphasis added). Criminal justice agencies may obtain that information "for purposes of the administration of criminal justice." Id. at -2.1(a) (emphasis added). The highlighted terms encompass "[t]he detection, apprehension, detention, . . . prosecution, [or] adjudication . . . of accused persons or criminal offenders." Id. at -1.1. Because jury selection is a part of the adjudicative process, the State contends, it has the power to run criminal history checks on prospective jurors.

There is very little case law on the subject. We therefore do not question the State's good-faith belief that it had the authority to run the background check it conducted in this case. But administrative regulations generally may

not govern the intricacies of jury selection any more than they could control other aspects of a trial.

The State Constitution authorizes the Legislature to pass general, but not special, laws relating to "[s]electing, drawing, summoning or empaneling grand or petit jurors." N.J. Const. art. IV, § 7, ¶ 9(4).[4] At the same time, the Constitution directs that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." N.J. Const. art. VI, § 2, ¶ 3; see also Winberry v. Salisbury, 5 N.J. 240, 243-48, 255 (1950) (noting that the area of practice and procedure is exclusively within the Court's rulemaking power); In re Supervision of Petit Jury Panels, 60 N.J. at 559-62 (discussing various statutes but noting that "the Constitution reposes in the Supreme Court the responsibility to see that all aspects of jury procedure -- so uniquely vital to our system of judicial administration -- are preserved, maintained and developed to play their essential part in meting out justice").

The above regulations are therefore not determinative of how and when background checks can be done of prospective jurors.

[4] N.J.S.A. 53:1-20.6(a), which enables the Superintendent of the State Police to adopt rules and regulations relating to the "dissemination . . . of criminal history record background information" is not a source of authority for the process of selecting jurors.

B.

New Jersey case law on the issue is sparse. One reported Law Division decision rejected the State's request for a list of dates of birth for members of the jury pool. In re State ex rel. Essex Cnty. Prosecutor's Off., 427 N.J. Super. 1, 26 (Law Div. 2012). The State intended to use the information to run criminal background checks on prospective jurors. Id. at 4.

The court noted that individuals summoned for jury service have reasonable privacy concerns, id. at 19, and that providing information only to the prosecution raised due process issues, id. at 24-25. The court also observed that granting the State full "discretion to decide which jurors to research and for what reasons" raised concerns addressed in Batson and Gilmore. Id. at 25. In the end, the court held that "[t]he neutrality of the Judiciary, fundamental notions of fairness, due process protections afforded to criminal defendants, and the potential for abuse in the uneven sharing of information" counseled against giving "private juror information to the State." Id. at 25-26.

Other jurisdictions have considered background checks on prospective jurors. The Iowa Supreme Court held that prosecutors may run a criminal history check only if they first obtain a court order. Bessenecker, 404 N.W.2d at 138 (interpreting a state statute). To justify the request, prosecutors must

show "there is a reasonable basis for believing that the rap sheet may contain information that is pertinent to the individual's selection as a juror and that is unlikely to be disclosed through voir dire or through juror questionnaires." Ibid.

To avoid possible abuses, the Supreme Judicial Court of Massachusetts has held that prosecutors must obtain court approval to perform criminal record checks on jurors after a jury is sworn. Commonwealth v. Hampton, 928 N.E.2d 917, 930-31 (Mass. 2010). If a check is run during jury selection, prosecutors must immediately share the information with defense counsel. Commonwealth v. Cousins, 873 N.E.2d 742, 750 (Mass. 2007).

Other jurisdictions also require prosecutors who access criminal history records to disclose that information to defense counsel. See State v. Goodale, 740 A.2d 1026, 1030-31 (N.H. 1999); Losavio v. Mayber, 496 P.2d 1032, 1034-35 (Colo. 1972) (en banc); Tagala v. State, 812 P.2d 604, 612-13 (Alaska Ct. App. 1991); see also State v. Second Jud. Dist. Ct., 431 P.3d 47, 50-52 (Nev. 2018) (requiring disclosure of criminal history information from a government database that is unavailable to the defense upon a defense motion); Bessenecker, 404 N.W.2d at 139 (requiring disclosure to defendant "unless good cause is shown to the contrary"); cf. People v. Murtishaw, 631 P.2d 446,

465 (Cal. 1981) (holding trial judges "have discretionary authority to permit defense access to jury records and reports").

Yet other courts impose no such limits on the prosecution. See Coleman v. State, 804 S.E.2d 24, 30 (Ga. 2017); Charbonneau v. State, 904 A.2d 295, 319 (Del. 2006); State v. Smith, 532 S.E.2d 773, 779-80 (N.C. 2000); People v. Franklin, 552 N.E.2d 743, 750-51 (Ill. 1990); State v. Jackson, 450 So. 2d 621, 628 (La. 1984); Salmon v. Commonwealth, 529 S.E.2d 815, 819 (Va. Ct. App. 2000); State v. Hernandez, 393 N.W.2d 28, 29-30 (Minn. Ct. App. 1986).

C.

In providing guidance on this topic, we attempt to accommodate multiple interests: the overriding importance of selecting fair juries that are comprised of qualified, impartial individuals; the need for an evenhanded approach that applies to all parties; the need to guard against background checks prompted by actual or implicit bias; and the importance of having a process that respects the privacy of jurors and does not discourage them from serving. With those aims in mind, we rely on the Court's supervisory power to outline the following framework for conducting criminal background checks of jurors. See N.J. Const. art. VI, § 2, ¶ 3; In re Supervision of Petit Jury Panels, 60 N.J. at 561-62.

Going forward from today, any party seeking to run a criminal history check on a prospective juror must first get permission from the trial court. For requests made before the jury has been empaneled, the prosecution or defense should present a reasonable, individualized, good-faith basis to believe that a record check might reveal pertinent information unlikely to be uncovered through the ordinary voir dire process. See Bessenecker, 404 N.W.2d at 138. The Attorney General agrees that mere hunches are not sufficient to justify a criminal record check.

Opposing counsel must be notified of the request. If counsel objects, the court should give both sides an opportunity to be heard. As a general rule, we do not envision a full-blown Batson/Gilmore hearing at this phase of the proceedings. Trial judges have discretion to limit or expand the scope of an argument based on the circumstances presented and the interests set forth above.

Certain requests can be dispensed with quickly. The Attorney General appropriately conceded that prosecutors should not seek to check "jurors' criminal histories just because they deny having been arrested, charged with a crime, or convicted of a crime." Nor would there be a reasonable basis to conduct a background check simply because a prospective juror had prior contact with law enforcement officers; expressed distrust of law enforcement;

has a close relationship with individuals who have been accused of or were victims of crime; lives in a high-crime neighborhood; has a child outside of marriage; receives public benefits; or is not a native English speaker. See Wash. Gen. R. 37(h). We adopt those presumptively invalid reasons in large part from a rule the Washington Supreme Court enacted in the context of peremptory challenges. See ibid.

As a practical matter, the Judiciary does not have the ability to conduct background checks on its own. If the court grants a party's request, the prosecution will ask the appropriate law enforcement official to run a criminal history check. To ensure a level playing field, the results are to be shared with all parties and the court.

If the results raise legitimate concerns about a person's ability to serve, the trial judge should question the prospective juror. See Andujar, 462 N.J. Super. at 555. Some individuals may simply not qualify for jury service under the law.[5] In other cases, the outcome may be far from clear. Jurors, therefore,

[5] N.J.S.A. 2B:20-1 lists the statutory requirements for jury service. To be eligible, a person must (1) be 18 years of age or older, (2) be able to read and understand English, (3) be a citizen of the United States, (4) be a resident of the county in which the individual was summoned, (5) not have been convicted of any indictable offense, and (6) not have any mental or physical disability that would prevent the person from serving. A prior arrest or outstanding warrant does not automatically bar an individual from serving on a jury.

should generally be afforded an opportunity to explain and provide context for the results of a background check.

Judges are to question prospective jurors on the record and may invite counsel to supplement the inquiry, consistent with Rule 1:8-3(a). Afterward, either party can seek to remove the juror for cause or use a peremptory challenge. At that point, a party may raise a Batson/Gilmore challenge.

In very rare cases, a party may ask the court for leave to perform a criminal record check on a juror after a jury is empaneled. To avoid any possible efforts to manipulate the make-up of a sitting jury, requests for background checks of empaneled jurors should be granted only when compelling circumstances exist. See Hampton, 928 N.E.2d at 930-31. If, for example, a party learned during trial that a sitting juror had been convicted of an indictable offense, the situation would present a compelling circumstance.

V.

Under the circumstances here, we find that defendant was denied his right under the State Constitution to a fair and impartial jury selected free from discrimination. The record reveals that implicit or unconscious racial bias infected the jury selection process in violation of defendant's fundamental rights.

Earlier in the opinion, we recounted the voir dire process for F.G. at length and set out different concerns the State and defense counsel voiced. Among other reasons, it appears from the record that the State did not want F.G. seated as a juror because of his relationships with multiple individuals who had committed crimes or were victims of crime. F.G., a Black male from Newark, admitted he grew up in a neighborhood where many residents sold drugs, including a number of his friends. He said he knew them and was familiar with their lifestyle but explained he did not follow their path. He also explained that he was familiar with certain language used in the criminal justice system, like "CDS" and "trigger lock," from the "neighborhood."

None of that disqualified F.G. from serving on a jury. Growing up in high-crime area is not a basis to be removed from a jury panel. Having friends who broke the law is not either. Just the same, understanding actual terms that relate to drug and firearms offenses is not a reason to be kept off a jury.

F.G., an employee at the Department of Public Works who coached football in his spare time, made clear that he believed the criminal justice system was fair and effective "because you are judged by your peers." Yet the prosecution suggested his background and associations "dr[ew] into question whether he respect[ed] the criminal justice system" and the rule of law. Taken

as a whole, the State's arguments during the voir dire process to remove F.G. reflected implicit or unconscious bias about race.

As the Appellate Division aptly noted, "[t]he prosecutor presented no characteristic personal to F.G. that caused concern, but instead argued essentially that because he grew up and lived in a neighborhood where he was exposed to criminal behavior, he must have done something wrong himself or must lack respect for the criminal justice system." Andujar, 462 N.J. Super. at 562. That argument, the court observed, was not new, and historically stemmed from impermissible stereotypes about racial groups -- particularly Black Americans. Ibid.

The prosecution also speculated that, based on F.G.'s answers, it "felt" as though he knew more people who had been accused or were victims of crimes and had not been forthcoming about them. Defense counsel, in response, pointed out the obvious: that living in a high-crime area exposes a person to certain facts of life. Counsel noted that "to hold it against him that . . . things have happened around him to people that he knows . . . would mean that a lot of people from Newark would not be able to serve."

The trial court properly denied the State's challenge that F.G. be removed for cause. Ordinarily, the next step would have been for the State to exercise a peremptory challenge that defendant could have challenged under

Batson and Gilmore. Instead, the State ran a criminal history check on F.G. In doing so, it relied on reasons the trial court had rejected. To be clear, the State would not have been able to run a criminal history check under the standard outlined above. It has yet to offer a reasonable, individualized basis for conducting a record check of F.G. As a result, to the extent the State relies on the results of the check to justify F.G.'s removal, its argument lacks force.

The series of events raises another serious concern as well. According to the record, the State did not randomly search prospective jurors for their criminal history. It focused on a single juror, F.G. As the Supreme Court has explained, disparate investigations of minority jurors may turn up "seemingly race-neutral reasons to strike the prospective jurors of a particular race." Flowers, 588 U.S. at ___, 139 S. Ct. at 2248. Disparate investigations may also indicate that discrimination has occurred during jury selection. See ibid.

F.G.'s record check uncovered two prior arrests and an outstanding warrant from Newark Municipal Court issued in 2015. F.G. had no prior convictions, and the open warrant for simple assault was dismissed eight weeks later. His history did not disqualify him from jury service. See N.J.S.A. 2B:20-1.

The State appropriately alerted the judge and defense counsel to the results. But it also contacted law enforcement in an apparent effort to have

F.G. arrested before jury selection resumed. With F.G.'s arrest set in motion, the discussion in court the day after F.G.'s voir dire shifted to how his arrest should be carried out.

Defense counsel did not object to the State's renewed application to remove F.G. for cause. Counsel, however, did place a number of concerns on the record: that the State singled out F.G. to check for a criminal record; that it chose to run a background check on a juror it did not like; and that selectively targeting F.G. implicated constitutional concerns. When the prosecution renewed its motion to remove F.G. for cause, counsel should have presented a more crisp, precise objection, which the defense has since advanced. At the time, despite the broader concerns counsel asserted, defense counsel asked only for an additional peremptory challenge.

Under settled case law, counsel must present a timely objection during jury selection. See Gilmore, 103 N.J. at 535 (concerning objections to peremptory challenges); Osorio, 199 N.J. at 501. We do not relax that requirement. An objection prompts the timely review of any questionable challenges under Batson/Gilmore. Here, however, by unilaterally running a criminal history check on F.G. and setting his arrest in motion, the State effectively evaded any Batson/Gilmore analysis. In light of the framework outlined for future background checks, what took place at defendant's trial is

unlikely to happen again. Nonetheless, we cannot look away from evidence suggesting implicit bias in the jury selection process that appears in the extensive record before the Court.

Although no formal Batson/Gilmore evaluation was conducted before the trial court, the record relating to F.G.'s removal is unusually detailed. An extended series of arguments over the course of two days sets forth the parties' positions and explains their actions. That record reveals that the circumstances surrounding F.G.'s dismissal allowed for an inference that his removal was based on race -- which, again, is a slight burden to establish. See Batson, 476 U.S. at 97 (noting that a party's "questions and statements during voir dire examination and in exercising [the party's] challenges may support or refute an inference of discriminatory purpose"); Osorio, 199 N.J. at 492.

F.G., a minority juror, answered all questions posed in a manner that led the trial judge to conclude "he would make a fair and impartial juror." The judge added, "[e]verything he said and the way he said it leaves no doubt in my mind that he[] . . . does not have any bias towards the State nor the defense for anything." The State nonetheless selectively conducted a background check on F.G. alone, based on a hunch F.G. could not be impartial because of his background, associations, and familiarity with the criminal justice system. See Flowers, 588 U.S. at ___, 139 S. Ct. at 2247-48; Gilmore, 103 N.J. at 539.

For reasons already discussed, the State's justifications for running the check and seeking F.G.'s removal did not rebut that inference of discrimination. Osorio, 199 N.J. at 492, 504. In fact, the trial court had already considered and discounted the State's reasons when the court denied its motion to remove F.G. for cause. And throughout the appellate process, the State has not provided a convincing non-discriminatory reason for the steps it took to keep F.G. off the jury.

Finally, weighing the evidence in the record as a whole reveals, by a preponderance of the evidence, that F.G.'s removal and the background check that prompted it stemmed from impermissible presumed group bias. Id. at 492-93. Plus, as noted earlier, the background check itself did not uncover information that disqualified F.G. from serving on a jury.

To be clear, we do not find the trial prosecutors engaged in purposeful discrimination or any willful misconduct. The record, instead, suggests implicit or unconscious bias on the part of the State. In the end, we find that defendant's constitutional right to be tried by an impartial jury, selected free from discrimination, was violated.

There are a limited number of remedies available now. During jury selection, a trial court can return an excused juror to the jury box, forfeit one side's peremptory challenges, grant the other side additional ones, or start the

selection process anew. See Andrews, 216 N.J. at 293. None of those options exist at this time. We agree with the Appellate Division that defendant's conviction must be reversed and the case remanded for a new trial. Andujar, 462 N.J. Super. at 563.

No showing of prejudice is required. Wagner, 180 N.J. Super. at 567. The violation of defendant's constitutional right in this case is not subject to a harmless error analysis. Gilmore, 103 N.J. at 544.

VI.

For reasons noted earlier, we have considered implicit bias as part of the Gilmore analysis in this appeal. Defendant is entitled to the benefit of this new rule of law. Except for him, we apply the rule only to future cases -- that is, cases in which a jury has not yet been selected -- because of the effect that retroactive application would have on a potentially large number of cases with incomplete records and the effect on the administration of justice overall. See State v. Henderson, 208 N.J. 208, 300-02 (2011). The Court plans to provide additional guidance on how trial courts should assess implicit bias after the Judicial Conference discussed in the following section. The new rule will go into effect when that guidance is available. See id. at 302 (implementing a new rule thirty days after "this Court approves new model jury charges on eyewitness identification").

VII.

A defendant's right to a properly selected jury is precious and must not be tainted by discrimination. Osorio, 199 N.J. at 492. In the same way, no citizen should be denied the right to serve because of the person's religious principles, race, ethnicity, national origin, gender, sexual orientation, or some other impermissible basis. See Powers, 499 U.S. at 409 (noting jurors have "the right not to be excluded . . . on account of race"); Gilmore, 103 N.J. at 526 n.3 (identifying, at a minimum, certain cognizable groups). The harm in both instances extends beyond the defendant and the excluded juror. It "touch[es] the entire community" and "undermine[s] public confidence in the fairness of our system of justice." Batson, 476 U.S. at 87.

The criminal justice system rests on having cases decided by impartial jurors, who are drawn from a representative cross-section of the community and selected free from discrimination. To give meaning to those principles, we must acknowledge that discrimination can infect the existing jury selection process. And we must take steps to address that serious problem.

As discussed above, qualified jurors can be excused in two ways. The court may excuse them for cause if it appears they cannot serve as fair and impartial judges of the facts. And attorneys, in their discretion, can use peremptory challenges to strike individual jurors without stating a reason.

Federal and state courts both allow for peremptory challenges. In non-capital felony cases, federal courts grant ten challenges to defendants and six to the government. Fed. R. Crim. P. 24(b)(2). In state courts, the national average for peremptory challenges in non-capital felony trials is approximately seven. Nat'l Ctr. for State Cts., Comparative Data: Peremptory Challenges, https://www.ncsc-jurystudies.org/state-of-the-states/jury-data-viz (last visited July 7, 2021).

The number of peremptory challenges in New Jersey stems from a statute enacted more than a century ago. See L. 1898, c. 237, §§ 80-83; see also Brown v. State, 62 N.J.L. 666, 672 (E. & A. 1899). The nineteenth-century law granted defendants twenty challenges and the State twelve for various serious crimes. Ibid. New Jersey still allows the same number of challenges for serious offenses. See N.J.S.A. 2B:23-13(b).[6]

Our state today provides far more challenges than any other in the nation -- more than twice the national average, and twice the practice in federal court. But as the Supreme Court has recognized, "there can be no dispute[] that

[6] The 1898 law listed these offenses: treason, murder, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury, and subornation of perjury. L. 1898, c. 237, § 80. N.J.S.A. 2B:23-13(b) covers a similar, broader list of offenses: kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery (in the third degree), and perjury.

peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)). As the Court further explained, "[t]he reality of practice, amply reflected in many state- and federal-court opinions, shows that [peremptory] challenge[s] may be, and unfortunately at times [have] been used to discriminate against black jurors." Id. at 98.

Although the law in New Jersey has not changed since 1898, society now has a greater appreciation for the role of implicit or unconscious bias in general, and the danger of discrimination in the jury selection process. Some sources observe that discriminatory challenges persist after Batson and that "peremptory challenges have become a cloak for race discrimination." Saintcalle, 309 P.3d at 334. Others maintain that peremptory challenges offer "very real protections against juror bias." N.J. State Bar Ass'n, Pandemic Task Force Report of the Committee on the Resumption of Jury Trials 3 (July 2, 2020) https://tcms.njsba.com/personifyebusiness/Portals/0/2020%20Pandemic%20Task%20Force/NJSBA%20RJT_Jury%20Selection%20Proposal.pdf.

It is time for a thoughtful, comprehensive discussion of the issue. In the past, the Judiciary has arranged Judicial Conferences to consider significant

issues and make improvements in the justice system. Topics have included speedy trial, Probation, Family Court, alternative dispute resolution, and juvenile justice, among others.

Today, we ask the Director of the Administrative Office of the Courts to arrange for a Judicial Conference on Jury Selection to convene this fall. Rule 1:35-1 outlines the Conference's membership. In addition to the officials, organizations, and public members the Rule identifies, the Court will invite legal experts, scholars, and interested advocacy groups to participate, including organizations that regularly appear before the Court as amici curiae.

The Conference will explore the nature of discrimination in the jury selection process. It will examine authoritative sources and current practices in New Jersey and other states, and make recommendations for proposed rule changes and other improvements.[7] The purpose of the Conference is straightforward: to enhance "public respect for our criminal justice system and the rule of law" by "ensur[ing] that no citizen is disqualified from jury service because of . . . race" or other impermissible considerations. Batson, 476 U.S. at 99.

[7] At this time, we decline to adopt rule changes that defendant and amici recommend. Their suggestions as well as others may be raised at the Judicial Conference where all interested parties will have an opportunity to weigh in.

We invite the legal community as a whole to take part in a probing conversation about additional steps needed to root out discrimination in the selection of juries.

VIII.

For the reasons set forth above, we modify and affirm the judgment of the Appellate Division and remand the case for a new trial. We also call for a Judicial Conference on Jury Selection.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

STATE OF NEW JERSEY, Respondent, VS. JAMES COMER, Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 084509 Criminal Action On Appeal From: Superior Court of New Jersey, Appellate Division Honorable Judges Jack M. Sabatino, Thomas W. Sumners, Jr., and Richard J. Geiger Docket No.: A-001230-18

SUPPLEMENTAL BRIEF OF APPELLANT JAMES COMER

Attorney of Record

Lawrence S. Lustberg
(Attorney ID No. 023131983)
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
llustberg@gibbonslaw.com

On the Brief

Alexander Shalom
(Attorney ID No. 021162004)
Jeanne LoCicero
(Attorney ID No. 024052000)
ACLU New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
ashalom@aclu-nj.org

Avram D. Frey
(Attorney ID No. 188002016)
1145 Poquito Street
Austin, Texas 78702
(646) 229-4385
avidfrey@gmail.com

Counsel for Appellant James Comer

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INTRODUCTION

This case concerns the constitutionality of N.J.S.A. 2C:11-3b(1) as applied to juveniles under the Eighth Amendment to the United States Constitution and Article 1, Paragraph 12 of the New Jersey Constitution. That statute imposes a mandatory minimum sentence of 30 years without the possibility of parole for murder, a harsh, non-discretionary term that fails to account for the hallmark vulnerabilities of young people and, even more significantly, their unique capacities for reform. Consistent with the recent sea change in the law of juvenile sentencing, the Court should now hold that a mandatory minimum sentence of 30 years without parole is disproportionate for juveniles, and that if a juvenile is to be sentenced to such a lengthy term without eligibility for parole, that sentence may only be imposed as a matter of discretion following an individualized sentencing determination that accounts for the defendant's youth.

Appellant's challenge to the constitutionality of N.J.S.A. 2C:11-3b(1) is properly analyzed under the well-established framework of proportionality review. This entails consideration of numerous factors, including evidence of societal norms, the culpability of the class of offenders at issue, the severity of the punishment in question, and whether traditional justifications support the punishment.

Under this framework, N.J.S.A. 2C:11-3b(1) is disproportionate as applied to juveniles. Recent jurisprudence, including this Court's landmark decision in *State v. Zuber*, 227 N.J. 422 (2017), makes manifest that juveniles are different from adults in ways that diminish their culpability and undermine the justifications for harsh sentencing. Moreover, science and social science research, of exactly the kind that courts consider in conducting proportionality review, reveals that 30 years without parole is severe punishment that might be warranted for juveniles only in limited circumstances, but certainly not in every case, as N.J.S.A. 2C:11-3b(1) compels. Thus, consideration of the relevant factors leads inescapably to the conclusion that a 30-year mandatory minimum without parole is unconstitutional for juveniles under State and Federal Law.

The Appellate Division below came to the opposite conclusion on two bases. First, it held that *State v. Pratt*, 226 N.J. Super. 307 (App. Div. 1988), which upheld a mandatory minimum 30-year sentence for juveniles over three decades ago, remained good law. And second, the Appellate Division held that deference to the Legislature was called for and that the Court should stay its hand to allow for legislative action, even years after this Court called for such action four years ago to no avail. Neither rationale is persuasive. Comer's constitutional challenge requires proportionality review in accordance with contemporary standards,

and the Judiciary may not defer on questions of constitutional rights, squarely presented. Accordingly, this Court should reverse the decision below, hold N.J.S.A. 2C:11-3b(1) unconstitutional as applied to juveniles, and reverse and remand for resentencing.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY[1]

(1) Comer's Conviction and Original Sentence

On April 17, 2000, while 17 years old, Comer participated in a string of armed robberies with co-defendants Ibn Adams and Dexter Harrison, during which Adams shot and killed one of the robbery victims, George Paul. *State v. Adams*, 194 N.J. 186, 191 (2008). Comer was tried and, on December 19, 2003, convicted of (1) second-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2; (2) first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); (3) four counts of first-degree robbery, N.J.S.A. 2C:15-1; (4) six counts of third-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b); (5) four counts of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and (6) third-degree theft of an automobile, N.J.S.A. 2C:20-3(a). *Adams*, 194 N.J. at 198.

At Comer's initial sentencing on March 5, 2004, the trial court noted, "[n]othing in your conduct or your background

[1]For the convenience of the Court, this brief combines its recitation of the facts and the procedural history, as those matters are here inextricably intertwined.

mitigates the crimes for which you stand before me convicted," 1T at 33:16-17,[2] and imposed a term of 75 years imprisonment, 68 years and three months of which were to be served without eligibility for parole. That sentence consisted of a 30-year term without parole eligibility for the felony-murder count pursuant to N.J.S.A. 2C:11-3b(1), and consecutive terms of 15 years for the three counts of first-degree robbery (the fourth armed robbery having merged with the felony murder conviction), 85% of which were to be served without eligibility for parole pursuant to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. In addition, Comer was sentenced to four years for each of five weapons charges and four years for the automotive theft charge, each of which was to run concurrently with all other counts of the indictment. *See Adams*, 194 N.J. at 198; *see also* 1T at 34:17 – 41:7.

On appeal, the Appellate Division affirmed Comer's conviction and sentence. *State v. Adams*, 2006 WL 3798760 (App. Div. Dec. 28, 2006). This Court affirmed on March 26, 2008. *Adams*, 194 N.J. 186.

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[2]1T is the transcript of the original sentencing on March 5, 2004
2T is Vol. 1 of the resentencing transcript of August 2, 2018
3T is Vol. 2 of the resentencing transcript of August 2, 2018
4T is the transcript of resentencing on October 5, 2018
A[number] refers to Comer's Appellate Division Appendix
CA[number] refers to Comer's Appellate Division Confidential Appendix filed under seal
[number]a refers to Comer's Appendix to the Petition for Certification

(2) Comer's Motion to Correct an Illegal Sentence

On May 23, 2013, Comer moved to correct his sentence under New Jersey Court Rule 3:21-10(b)(5). Comer alleged that his sentence was unlawful under the Eighth Amendment to the United States Constitution and Article 1, Paragraph 12 of the New Jersey Constitution, following the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* held that a juvenile homicide offender may not be sentenced to life without parole absent consideration of several factors, including

- "chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
- "the family and home environment";
- "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
- "inability to deal with police officers or prosecutors (including on a plea agreement) or [] incapacity to assist [the juvenile's] own attorneys"; and
- "the possibility of rehabilitation."

567 U.S. at 477-78. Comer argued that his sentence violated *Miller* because he was a juvenile at the time of the offense; because a term of 68 years and three months without parole is the functional equivalent of life without parole; and because the Court sentenced him without consideration of the *Miller* factors.

On May 11, 2015, the trial court granted Comer's motion, finding that Comer was "entitled to a re-sentencing in accordance

with the procedures mandated by *Miller*." A39 (*State v. Comer*, Indictment No. 03-01-0231I, Memorandum Opinion at 11 (Law Div. May 11, 2015)).

This Court affirmed. *See Zuber*, 227 N.J. 422.[3] First, the Court held that there is no constitutional difference between sentences formally designated "life without parole" and term-of-years sentences that are their functional equivalent:

> *Miller*'s command that a sentencing judge "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," applies with equal strength to a sentence that is the practical equivalent of life without parole.
>
> [*Id.* at 446-47 (quoting *Miller*, 567 U.S. at 480).]

Second, emphasizing that "[t]he focus at a juvenile's sentencing hearing belongs on the real-time consequences of the aggregate sentence," *Zuber* held that "judges must evaluate the *Miller* factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense" and "when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times," *i.e.* "when judges decide whether to run counts consecutively [in conjunction with the factors listed in *State v. Yarbough*, 100 N.J. 627 (1985)],

[3]Comer moved for direct certification, which this Court granted. The Court issued a consolidated opinion in Comer's case and that of Ricky Zuber, a juvenile defendant who raised related constitutional issues. *Zuber*, 227 N.J. at 434.

and when they determine the length of the aggregate sentence." *Id.* at 447. Thus, *Zuber* underscored that "judges must do an individualized assessment of the juvenile about to be sentenced — with the principles of *Graham* [*v. Florida*, 560 U.S. 48 (2010)] and *Miller* in mind" before imposing a "lengthy period of parole ineligibility." *Id.* at 450.

Third, however, *Zuber* noted that even if courts fully complied with *Miller* before imposing "lengthy sentences with substantial periods of parole ineligibility," such sentences might still prove unconstitutional because *Graham* forbids "'[s]tates from making the judgment [of a juvenile's capacity for reform] *at the outset*'" absent "any chance to *later* demonstrate . . . fit[ness] to rejoin society." *Id.* at 451 (quoting *Graham*, 560 U.S. at 75, 79) (emphasis in *Zuber*). "[R]ecogniz[ing] that it would raise serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date," the Court "encourage[d] the Legislature to examine this issue." *Id.* at 452. On this point, the Court cited with approval legislation from eight States requiring that juveniles receive an opportunity for either parole or resentencing after a specified term, seven of which drew the line at between 15 and 25 years. *Id.* at 452 n.3. The Court then vacated Comer's sentence and remanded for resentencing consistent with its opinion. *Id.* at 453.

(3) Resentencing

The trial court held resentencing proceedings on August 2 and October 5, 2018. Comer argued as a threshold matter that N.J.S.A. 2C:11-3b(1), which mandates a minimum penalty of 30 years without eligibility for parole for murder, is unconstitutional as applied to juvenile offenders. As a result, Comer argued, the court could not sentence him pursuant to N.J.S.A. 2C:11-3b(1), but should instead determine an individualized, aggregate sentence for all counts of convictions based on application of the *Miller* factors, the *Yarbough* factors, and the statutory aggregating and mitigating factors listed at N.J.S.A. 2C:44-1. Comer argued that under this framework, the court should impose a sentence that would provide for his release as soon as his reentry plan could be instituted, which would translate to an aggregate term of approximately 21 years. In support, Comer provided evidence from family members and others detailing a childhood marked by abuse, neglect, and extensive exposure to drug abuse and criminality; the expert opinion of psychiatrist Dr. Richard Dudley, Jr., M.D., that Comer's offense conduct reflected childhood trauma and the developmental shortcomings of youth, and that Comer was presently rehabilitated and could achieve no further benefit from prison, CA44-76; and a Reentry Plan and supporting testimony by former Governor James McGreevey detailing precise and thorough arrangements for Comer's housing, employment, and social, psychological, logistical, and

spiritual support upon release, A77-83; 3T at 68:10 - 97:17. The State presented no witnesses to counter the evidence Comer presented.

On October 5, 2018, the court sentenced Comer to an aggregate term of 30 years without eligibility for parole. The court agreed that Comer's background mitigated his offense conduct under the *Miller* factors, that he had demonstrated reform in prison, and that consecutive sentencing was unwarranted under the *Yarbough* factors:

> This Court finds that the Defendant grew up in an environment that forced his criminal behavior. Defendant's parents and extended family had criminal histories and involvement with drugs. The reality of criminal behavior as a way of life was [] inescapable for the Defendant. And Defendant has shown an ability to be rehabilitated and has been incident free for four years while incarcerated. His involvement . . . as a mentor at the prison indicates an understanding of the consequences of his previous actions. As a juvenile, the Defendant may not have been as able to appreciate the criminality of his behavior and the impact it would have on others, especially, George Paul and his family.
>
> [4T at 79:22 – 80:11.]

Nonetheless, the court rejected Comer's constitutional challenge to N.J.S.A. 2C:11-3b(1), stating:

> The Court declines the Defense's invitation to find the sentencing structure of N.J.S.A. 2C:11-3(b)(1) unconstitutional as applied to you. The authors of our criminal code have determined that there must be a minimum period of 30 years of incarceration for murder. While it is unknown to what degree you will be, or need to be, deterred,

> it's clear that society abhors the taking of life and our citizens must know that [if] they do so, or participate in a criminal act that results in death, they are subject to a minimum of 30 years in prison.
>
> [4T at 81:1-14.[4]]

Accordingly, the court imposed a sentence of 30 years with a 30-year period of parole ineligibility for felony-murder; 15 years with 85% parole ineligibility pursuant to NERA for each of three first degree armed robbery counts; four years for each of five weapons charges; and four years for the automotive theft charge, all to run concurrently. *Id.* at 82:18 – 86:1.

(4) Appeal

Comer timely appealed, raising the single question of whether the trial court erred in sentencing him pursuant to N.J.S.A. 2C:11-3b(1) because a mandatory minimum sentence of 30 years without eligibility for parole is unconstitutional as applied to juvenile offenders under the Eighth Amendment and Article 1, Paragraph 12. In an unpublished decision issued May 6, 2020, the Appellate Division rejected Comer's constitutional challenge and affirmed

[4]The court added that it was inclined to impose a term of 30 years without eligibility for parole in any event, purportedly rendering the constitutional question moot. 4T at 81:15 – 82:4. But because the court in fact sentenced Comer pursuant to N.J.S.A. 2C:11-3b(1) – and could not have imposed a term of 30 years with a 30-year parole disqualifier otherwise — the constitutionally of that statute is squarely at issue, as the Appellate Division recognized. *See State v. Comer*, 2020 WL 2179075, at *7-11 (N.J. App. Div. May 6, 2020) (resolving constitutional question as properly presented).

his sentence. *Comer*, 2020 WL 2179075, at *7-11. The Appellate Division relied principally on its 33-year-old decision in *Pratt*, 226 N.J. Super. 307, which upheld N.J.S.A. 2C:11-3b(1) as applied to juveniles. The court reasoned that "*Pratt* is directly on point and remains good law," and that "[n]either *Miller* nor *Zuber* require reversal of *Pratt*, since both cases addressed life sentences and their equivalents." *Comer*, 2020 WL 2179075, at *8, *11. To Comer's argument that the principles underlying the decisions in *Miller* and *Zuber* are not limited to sentences of life and *de facto* life without parole — as evidenced by *State in the Interest of C.K.*, 233 N.J. 44 (2018), which cited *Miller* and *Zuber* in striking down lifetime registration requirements for juveniles under Megan's Law — the Appellate Division wrote that such extensions of constitutional doctrine should properly come from this Court. *Comer*, 2020 WL 2179075, at *9 ("[*C.K.*] supports . . . caution because the trial court and this court agreed that a change in constitutional law had to come from the Supreme Court."); *id.* at *10 ("We must be mindful that as an intermediate appellate court, our institutional role is limited."). Finally, the Appellate Division agreed with the prosecution that "[t]he debate over applying the thirty-year minimum to juvenile murderers should instead proceed in the Legislature[.]" *Id.* at *11.

On June 4, 2020, Comer timely filed a Petition for Certification, raising the single question of whether N.J.S.A. 2C:11-3b(1)'s mandatory minimum sentence of 30 years without eligibility for parole is unconstitutional as applied to juveniles under the Eighth Amendment to the U.S. Constitution and Article 1, Paragraph 12 of the New Jersey Constitution. This Court granted the Petition on March 23, 2021.

LEGAL STANDARD AND BACKGROUND

The United States and New Jersey Supreme Courts apply a well-established analytical framework to claims that a particular punishment is disproportionate for a given category of individuals. *See*, *e.g.*, *Graham*, 560 U.S. at 61 (discussing the Court's approach in "cases adopting categorical rules" under the Eighth Amendment); *see Zuber*, 227 N.J. at 438 ("'The test to determine whether a punishment is cruel and unusual . . . is generally the same' under both the Federal and State Constitutions.") (quoting *State v. Ramseur*, 106 N.J. 123, 169 (1987)).[5]

[5]Though the test is the same, this Court can and should conduct its own proportionality analysis under the New Jersey Constitution. *State v. Ramseur*, 106 N.J. 123, 169 (1987) ("[T]his Court recognizes its freedom — indeed its duty — to undertake a separate analysis under the cruel and unusual punishment clause of the New Jersey Constitution."). This is especially so because Article I, Paragraph 12 of the State Constitution "affords greater protections . . . than does the [E]ighth [A]mendment of the federal constitution." *State v. Gerald*, 113 N.J. 40, 76 (1988) (rejecting *Tison v. Arizona*, 481 U.S. 137 (1987), and requiring evidence of

Under constitutional proportionality review, first, the Court must consider "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 U.S. at 61 (citation and quotation marks omitted); *accord State v. Maldonado*, 137 N.J. 536, 557-58 (1994). Next, the Court applies its "own judgment," *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008), examining the culpability of the class of offenders at issue, *Graham*, 560 U.S. at 67-68; *Maldonado*, 137 N.J. at 558-59; the severity of the punishment, *Graham*, 560 U.S. at 69-70; *State v. Gerald*, 113 N.J. 40, 89 (1988); and whether penological justifications support the sentence at issue, *Graham*, 560 U.S. at 71; *Ramseur*, 106 N.J. at 178-80. In performing this second step, the United States and New Jersey Supreme Courts have consistently relied upon scientific and social science research and literature. *See, e.g., Miller*, 567 U.S. at 471, 472 n.5 (quoting *Roper*, 543 U.S. at 569, in citing psychiatric and neurological studies of adolescent development, and noting, "science and social science .

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intent to kill for imposition of death sentence in New Jersey); *see also State v. Martini*, 144 N.J. 603, 618 (1996) (departing from federal precedent to hold that State Constitution prohibits individuals sentenced to death from waiving the right to post-conviction relief and gives counsel standing to challenge waiver); *State v. Marshall*, 130 N.J. 109, 207-209 (1992) (repudiating *McCleskey v. Kemp*, 481 U.S. 279 (1987), and holding that, in New Jersey, a defendant complaining of racial disparities in capital sentences "surely has a right to raise a structural challenge to the constitutional fairness of the New Jersey Capital Punishment Act").

. . have become even stronger"); *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *accord Zuber*, 227 N.J. at 439; *see also Atkins v. Virginia*, 536 U.S. 304, 317-18 (2002) (citing social science literature in finding individuals with intellectual disability insufficiently culpable for the death penalty). Ultimately, the Court does not balance the "objective indicia of society's standards" against the Court's "own judgment"; rather, "[i]f the punishment fails any one of [these] tests, it is invalid." *Gerald*, 113 N.J. at 78 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Applying this analysis, the United States and New Jersey Supreme Courts have recognized expanding limitations on the constitutional punishment of juveniles. The pertinent jurisprudence began with *Roper*, 543 U.S. 551, in which the Supreme Court banned the death penalty for juveniles based on "three general differences between juveniles under 18 and adults" that render them "'categorically less culpable'" for their conduct. *Id.* at 567-69 (citation omitted). In *Graham*, the Court held that the same developmental shortcomings prohibit sentencing a juvenile convicted of a non-homicide offense to life without the possibility of parole. 560 U.S. at 71-75. Because "'[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient

immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" *id.* at 69 (quoting *Roper*, 543 U.S. at 573), *Graham* held it unconstitutional for States to make the judgment that a juvenile non-homicide offender is incorrigible, and therefore deserving of life without parole, "at the outset," *id.* at 73. Instead, *Graham* held, juveniles convicted of non-homicide offenses must receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Miller extended this jurisprudence to juveniles convicted of homicide offenses. Specifically, *Miller* held that before a juvenile convicted of homicide may be sentenced to LWOP, the sentencing court must consider the defendant's "youth and its attendant characteristics" in mitigation, 567 U.S. at 465, 477-78, and that thereafter, only the "rare juvenile offender whose crime reflects irreparable corruption" may receive a sentence of life without parole, with all others entitled to the same "meaningful opportunity to obtain release" required by *Graham*. *Id.* at 479-80 (citations and quotation marks omitted). In *Montgomery v. Louisiana*, 577 U.S. 190 (2016), the Court held that *Miller* applied retroactively.

This Court extended these principles in *Zuber*, which held that under the State and Federal Constitutions, *Graham* and *Miller* apply equally to juveniles facing long sentences that fall short

of life without parole, whether for one offense or several. 227 N.J. at 429. As noted, *Zuber* recognized a further constitutional issue — whether juveniles sentenced to "lengthy periods of parole ineligibility" must receive an opportunity for parole or resentencing after a specified term of years — but referred this question to the Legislature in the first instance, as the question was not squarely presented. *Id.* at 452-53.

Most recently, in *Jones v. Mississippi*, 593 U.S. ___(2021), the Supreme Court held that *Miller* does not require a sentencing court to make a formal determination that a juvenile is permanently incorrigible before imposing a sentence of life without parole for homicide. But *Jones* reaffirmed that a *mandatory* term of life without parole is unconstitutional because it requires the imposition of that harsh penalty on juveniles who are, in fact, capable of reform:

> On the question of what *Miller* required, *Montgomery* [*v. Louisiana*, 577 U.S. 190 (2016)] was clear: "A hearing where youth and its attendant characteristics are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not."
>
> [Slip Op. at 12 (quoting *Montgomery*, 577 U.S. at 210).]

In this respect, *Jones* cited with approval "the key paragraph" of *Montgomery*, which held:

> "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence

> a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."
>
> [*Id.* at 7-8 n.2 (quoting *Montgomery*, 577 U. S. at 211).]

Jones rejected, however, that sentencing courts are subject to any "magic-words requirement," *id.* at 18, holding instead that sentencing courts must be trusted to employ their discretion in accordance with constitutional standards. *Id.* at 15. In this manner, *Jones* underscored that the core holding of *Miller* was its insistence on "a sentencing procedure similar to the procedure that this Court [] required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson v. North Carolina*, 428 U. S. 280, 303–305 (1976)." *Jones*, Slip. Op. at 9. Such a discretionary procedure, *Jones* elaborated, "ensures that the sentencer affords individualized consideration to, among other things, the defendant's chronological age and its hallmark features." *Id.* at 9-10 (citations and quotation marks omitted). Thus, *Jones* clarified that individualized sentencing discretion – as opposed to the imposition of *mandatory* punishment – is essential to implementing the constitutional limitations on juvenile sentencing.

In light of these precedents, and under the proportionality review discussed below, Comer now urges this Court to hold that individualized sentencing is necessary for juveniles convicted of

murder, and that a mandatory minimum sentence of 30 years without parole is accordingly unlawful. As to this question, the Court's review is *de novo*. *See State v. Galicia*, 210 N.J. 364, 381 (2012) ("We consider legal and constitutional questions de novo."); *State v. Hudson*, 209 N.J. 513, 529 (2012) ("Generally, the abuse-of-discretion standard of review applies in appellate sentencing review, . . . [but] questions of law [regarding application of a sentencing statute] are reviewed de novo[.]") (citations omitted).

ARGUMENT

I. A MANDATORY SENTENCE OF AT LEAST 30 YEARS WITHOUT ELIGIBILITY FOR PAROLE, AS REQUIRED BY N.J.S.A. 2C:11-3B(1), IS UNCONSTITUTIONAL AS APPLIED TO JUVENILES. (12a-32a, 4T AT 81:1 – 82:4)

A mandatory minimum sentence of 30 years violates the prohibitions against cruel and unusual punishment contained in the Eighth Amendment to the Constitution of the United States and Article I, Paragraph 12 of the New Jersey Constitution when applied to juveniles. That is, utilizing the factors that guide the constitutional analysis in this area – objective indicia of societal standards as measured through legislative enactments and actual sentencing practices; the severity of the sentence in question; and social science research concerning the ways that juveniles are different and how those differences bear upon the traditional purposes of punishment – leads inexorably to the conclusion that a mandatory, non-individualized sentence of no

less than 30 years without parole is unjustifiable for juveniles convicted of murder.

To be clear, Comer does not here argue that it is necessarily unconstitutional to sentence a juvenile homicide offender to a term of 30 years or more without eligibility for parole, just as a sentence of life without parole is not necessarily disproportionate for a juvenile offender under *Miller*.[6] As the Supreme Court recently said in *Jones*, "[u]nder *Miller* [], an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment." *Jones,* Slip. Op. at 1. Rather, Comer argues that just as a mandatory sentence of life without parole is prohibited under *Miller*, a mandatory term of no less than 30 years without parole, imposed without regard to the individual circumstances of both the defendant and the offense, is unlawful in the case of juveniles. Instead, the proportionality review mandated by the Constitutions of the United States and, especially,

[6]The upper limit on the length of "real time" a juvenile may serve before he must be afforded "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" – and if he is able to demonstrate rehabilitation, the length of time before which he must be released – has not been decided under Article I, Paragraph 12. *Zuber*, 227 N.J. at 429, 452-53 (citation and quotation marks omitted). That issue is not raised in this case, but it is in *State v. Zarate*, Dkt. No. 084516, a case for which the Court granted certification on the same day as it did so in this case.

of New Jersey, require that if a term of 30 years or more without parole is to be imposed on a juvenile offender consistent with constitutional requirements, that can only occur after an individualized determination that gives proper consideration to all relevant factors. Because that did not occur here, Comer's sentence should be vacated and he should be re-sentenced.

(a) *Objective indicia of society's standards show a consensus against mandatory terms of 30 years imprisonment without parole for juvenile homicide offenders.*

"[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (citation omitted). In this regard, courts look not to the total number of legislative enactments permitting or forbidding a particular sentence, but rather to "the consistency of the direction of change." *Id.* at 315. Here, as the Court noted with approval in *Zuber*, six State legislatures responded to the decisions in *Graham* and *Miller* by dramatically limiting the length of mandatory juvenile sentencing, requiring that juveniles receive either an opportunity for parole or the ability to petition for resentencing in less than 30 years. *See Zuber*, 227 N.J. at 452 n.4.[7] Four States and the District of

[7]Citing Cal. Penal Code § 3051(b) (2016) (maximum permissible juvenile term without parole eligibility is 25 years); Wyo. Stat. Ann. § 6-10-301(c) (2016) (same); W. Va. Code § 61-11-23(b) (2016) (15 years); Fla. Stat. § 921.1402 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at

Columbia have now passed similar laws,[8] bringing the total number of jurisdictions to 11 that effectively bar sentences of 30 years without parole eligibility for juveniles in *any* case, let alone in every case as a matter of course, as N.J.S.A. 2C:11-3b(1) mandates. Moreover, six States have recently enacted legislation limiting 30-year mandatory minimums to a limited category of juveniles, such as those convicted of multiple or particularly aggravated murders.[9] These States, too, reject the assumption underlying

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most, 25-year term); Wash. Rev. Code § 9.94A.730(1) (2016) (same, after 20 years); and Mont. Code Ann. § 46-18-222(1) (2016) (prohibiting all mandatory minimum sentences and periods of parole ineligibility in the case of juveniles).

[8]*See* Ken. Rev. Stat. 640.040 (1987) (maximum permissible juvenile term without parole eligibility is 25 years); Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020) (20 years); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019) (15 years); D.C. B21-0683, D.C. Act 21-568 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at most, 20 years); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same).

[9]Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of capital murder – all other offenses must provide parole opportunity after no more than 25 years); Colo. S.B. 16-3820, 70th Gen. Assemb., 2d Reg. Sess. (2016) (creating a special program within the Department of Corrections for juveniles which, if completed, creates a presumption of fitness for parole if the juvenile served 25 or 30 years, depending on the offense); Mass. H. 4307, 188th Gen. Court (2014) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of particularly aggravated murder); N.C. Gen. Stat. § 15A-1340.19A (2016) (only juveniles convicted of first-degree murder, exclusive of felony murder, eligible for sentence carrying parole ineligibility beyond 25 years); Nev. A.B. 267, 78th Reg. Sess. (2015) (only juveniles convicted of multiple homicides eligible for sentence with parole ineligibility beyond 20 years); Ohio S.B. 256, 133rd Gen. Assemb. (2020) (sentence with 30-year parole ineligibility authorized only for juveniles convicted of particular categories of murder).

N.J.S.A. 2C:11-3b(1) that 30 years without eligibility for parole is appropriate for every juvenile convicted of murder.

Also probative in the objective indicia analysis are "actual sentencing practices." *Graham*, 560 U.S. at 62. In the year after *Montgomery* held that *Miller* applies retroactively, approximately 1300 juvenile homicide offenders previously sentenced to life without parole were resentenced, and of that group, "the median sentence nationwide [was] 25 years before parole or release eligibility." *See* Campaign for Fair Sentencing of Youth, Report, "*Montgomery* Momentum: Two Years of Progress since *Montgomery v. Louisiana*, at 4 (2018).[10] In other words, half of all new sentences (649 total) provided a first opportunity for parole within 25 years or less — powerful evidence that society does not consider 30 years without parole appropriate for *all* juveniles convicted of homicide. Indeed, now four years removed from the decision in *Montgomery*, over 700 juveniles previously sentenced to LWOP have been released, further evidencing that society supports a rehabilitative approach to punishment even for those juveniles convicted of murder, and rejects the retributive rationale embodied by lengthy terms of parole ineligibility. *See* Campaign for Fair Sentencing of Youth, Report, "National Trends in

[10]*Available at* https://www.fairsentencingofyouth.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf

Sentencing Children to Life without Parole," at 2 (2021)[11]; *see also Jones*, Slip. Op. at 20 (noting that in Mississippi, where the defendant was convicted, "*Miller* has reduced life-without-parole sentences for murderers under 18 by about 75 percent") (citing Campaign for Fair Sentencing of Youth, Report, "Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children," at 7 (2018)).

Thus, both actual sentencing practices and State legislative enactments provide clear evidence: society does not consider long mandatory sentences, like one of 30 years without parole, appropriate for every juvenile convicted of murder. Instead, juveniles should be sentenced on an individual basis, with due regard for their unique vulnerabilities and capacity for reform.

(b) *Juvenile offenders are less culpable than adults.*

It is by now well-established that juveniles are categorically less culpable for their offense conduct in light of the "[t]hree general differences between juveniles under 18 and adults." *Roper*, 543 U.S. at 569; *accord Miller*, 567 U.S. at 471. First, juveniles are less mature and more irresponsible as compared to adults, "qualities that often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569 (internal citation omitted); *accord Miller*, 567 U.S. at 471; *Zuber*,

[11]*Available at* https://cfsy.org/wp-content/uploads/CFSY-National-Trends-Fact-Sheet.pdf

227 N.J. at 440;[12] second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *Roper*, 543 U.S. at 569; *accord Miller*, 567 U.S. at 471; *Zuber*, 227 N.J. at 440; and third, youth is a time period marked by transitory, developing identity, meaning that "'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.'" *Roper*, 543 U.S. at 570 (citation omitted); *accord Miller*, 567 U.S. at 471; *Zuber*, 227 N.J. at 440. Because these three general differences render juveniles less capable of conforming their conduct to the law, while also evidencing that juvenile offense conduct does not necessarily signal a depraved character, the Supreme Court holds juvenile offenders "categorically less culpable than the average criminal." *Roper*, 543 U.S. at 567.[13]

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[12]New Jersey courts have long recognized this fact as relevant to proportionate sentencing of juveniles. *See State v. Koskovich*, 168 N.J. 448, 554 (2001) (Zazzali, J., concurring) ("For what we find offensive about the execution of minors is not merely that they are 'young,' chronologically-speaking, but also that they tend to be immature. This Court has explained that '[i]n determining a defendant's 'relative' youth, a jury must look beyond chronological age to considerations of defendant's overall maturity.'") (quoting *State v. Bey*, 129 N.J. 557, 612 (1992)).

[13]Moreover, as the United States Supreme Court has made clear, the culpability of individuals like Comer "who did not kill or intend to kill" is "twice diminished." *Graham*, 560 U.S. at 69. Because N.J.S.A. 2C:11-3(b)(1) mandates a term of 30 years without parole for all murder convictions, including felony murder, *id.* at 2C:11-3(a)(3), it is particularly constitutionally suspect.

(c) ***A term of 30 years without eligibility for parole is harsh punishment.***

A mandatory sentence of 30 years without parole, to be imposed upon every juvenile defendant convicted of murder regardless of personal circumstances or the unique facts of the offense, is a very harsh prison sentence indeed. *See Pratt*, 226 N.J. Super. at 324 (stating of 30-year term without parole, "[o]f course, we acknowledge that the sentence was harsh"); *see also* U.S.S.G. Sentencing Table (2016) (establishing 30-year term as the baseline for the most severe Guidelines range in federal sentencing). Necessarily, an individual who serves a 30-year term spends decades in a punitive, often violent institutional setting, without liberty and cut off from society. *See* John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement* 11 (2006) (noting realities of "prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases[14]").

But individuals sentenced to 30 years are not merely forced to endure the deprivations and brutality of a lengthy prison sentence — they are also more vulnerable to the lasting, cumulative, physical and psychological damage that inheres in

[14]The current pandemic makes the prescience of this commentary striking: the incarcerated population in the United States has been infected by COVID-19 at a rate more than five times that of individuals in free society, with a mortality rate that is over 34% higher. *See* Equal Justice Initiative, "COVID-19's Impact on People in Prisons" (April 16, 2021), *available at* https://eji.org/news/covid-19s-impact-on-people-in-prison/

long-term incarceration. The resulting process of "accelerated aging" in people serving long sentences is well-documented: individuals subjected to extended incarceration often "develop[] [] chronic illness and disability at a younger age than the general U.S. population." Brie Williams & Rita Abraldes, "Growing Older: Challenges of Prison and Reentry for the Aging Population," in *Public Health Behind Bars* 56 (ed. Robert B. Greifinger 2007); *accord* B. Jaye Anno, *et al.*, "Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates," U.S. Dep't of Justice (2004)). Indeed, people incarcerated for long terms, on average, lead significantly shorter lives. *See* Sebastian Daza, *et al.*, "The Consequences for Mortality of Incarceration in the United States," Report, Center for Demography and Ecology, at 21 (2019) (longitudinal study documenting diminished life expectancy as correlated with extended incarceration);[15] *see also United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (noting, with respect to the federal system, "[l]ife expectancy . . . is considerably shortened").

People incarcerated for long terms are also at heightened risk of suffering the psychiatric harms of "institutionalization," *i.e.*, "the process by which inmates are shaped and transformed by

[15] *Available at* file:///C:/Users/Avidf/Downloads/Incarceration_Mortality_Sep_2019.pdf

the institutional environments in which they live." Craig Haney, "The Psychological Impact of Incarceration: Implications for Postprison Adjustment," in *Prisoners Once Removed* 38 (eds. Jeremy Travis & Michelle Waul 2004). These effects, which are "broad-based and potentially disabling," include, "dependence on institutional structure and contingencies, hypervigilance, interpersonal distrust and suspicion, emotional overcontrol, alienation, psychological distancing, social withdrawal and isolation, the incorporation of exploitative norms of prisoner culture, and a diminished sense of self-worth and personal value." *Id.* at 54. Because the process of institutionalization is "progressive or cumulative," meaning "the longer persons are incarcerated, the more significant is the nature of their institutional transformation," the effects for people serving long sentences are most severe. *Id.* at 38.

In addition, and relatedly, people sentenced to long terms face the greatest obstacles in reintegrating into society upon release. Reintegration is challenging under the best of circumstances:

> Upon release to the community, formerly incarcerated individuals face a daunting array of challenges. They often encounter major difficulties in securing housing, employment, and transportation, and they may be ineligible for public benefits. Having been incarcerated frequently results in serious damage to one's personal relationships and community and social

> supports, and the stigma of a criminal record can negatively impact one's social standing.
>
> ["Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety," Columbia Univ. Center for Justice at 62 (2015).[16]]

Accord Craig Haney, "The Psychological Impact of Incarceration," at 48 (noting, "returning prisoners face an extremely complicated transition," and specifically citing challenges related to employment, housing, social reintegration, and stigma). But people sentenced to long terms – who, under the current statutory scheme include *every* juvenile convicted of a murder, regardless of his circumstances or the facts of his case – face not only the additional obstacles of possible physical and psychiatric debilitation discussed above, but also the loss of crucial familial support over decades of incarceration. *See* Bruce Western, *et al.*, "Stress and Hardship After Prison," 120 Am. J. of Sociology 1512, 1517 (2015) ("Connections to family and friends tend to erode with lengthy terms of incarceration and histories of prolonged institutionalization[.]"). In other words, a mandatory sentence of at least 30 years without parole is particularly harsh because it jeopardizes an individual's mental and physical health and ability to fully reintegrate, thus engendering "a forfeiture that is irrevocable." *Graham*, 560 U.S. at 69.

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[16]*Available at* http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pd

And perhaps most significantly, 30 years without parole is especially harsh with respect to juvenile offenders. *See*, *e.g.*, *Graham*, 560 U.S. at 70-71 (that "[l]ife without parole is an especially harsh punishment for a juvenile" is a "reality [that] cannot be ignored"); *see also Zuber*, 227 N.J. at 429, 442, 449 (quoting *Graham*, and noting that the *Zuber* defendants were sentenced for "longer than the time served by some adults convicted of first-degree murder" and "will likely serve more time in jail than an adult sentenced to actual life without parole"). For example, youthful offenders in adult prisons are, empirical evidence shows, more likely to be targeted for assault and sexual violence while incarcerated. *See* Equal Justice Initiative, Report, "All Children Are Children: Challenging Abusive Punishment of Juveniles," at 9 (2017) (juveniles are five times more likely to be sexually assaulted and commit suicide more frequently than adults).

Finally, a mandatory 30-year term beginning in adolescence also necessarily means incarceration during the period when one would otherwise experience the transition to adulthood and the first hallmarks of adult life, potentially including marriage,[17]

[17]According to data provided by the United States Bureau of Labor Statistics compiled through a national longitudinal study of nearly 10,000 individuals born between 1980-84 (Comer was born in 1983), the mean age of initial cohabitation with a dating partner was 25.1, and the mean age of marriage was 27.5. *See* searchable

starting a family,[18] and career development and economic independence.[19] Indeed, because juvenile offenders experience the transition to adulthood in prison, they are more vulnerable to internalizing the norms of prison and so may struggle to ever regain these opportunities:

> Because many younger inmates lack mature identities and independent judgment when they are first institutionalized, they have little internal structure to revert to or rely upon when institutional controls are removed. Consequently, they often face more serious postprison adjustment problems.
>
> [Haney, "The Psychological Impact of Incarceration," at 40.]

That is not to say that upon release in one's mid-to-late 40's, a juvenile incarcerated for 30 years cannot start a family, establish a career, and successfully reintegrate, but it is undeniably much more difficult, as empirical data demonstrates: in one study, upon release from prison, individuals 44 and older, "received less support from family, were more likely to be insecurely housed or

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database *available at* www.nlsinfo.org/content/access-data-investigator

[18]The mean age of individuals within the United States at the time a first child is born is 26.6 years old. *See* Centers for Disease Control, Nat'l Ctr. for Health Statistics, *available at* https://www.cdc.gov/nchs/fastats/births.htm

[19]According to Bureau of Labor Statistics data, the majority of the workforce in the United States is between the ages of 16 and 44, and the median weekly income rises continuously for individuals over this timespan. *See* U.S. Dept. of Labor, Bur. Labor Stats., "Economic News Release" (2017), *available at* https://www.bls.gov/news.release/wkyeng.t03.htm

outside of regular households, and were less likely to be employed." Western, *et al.*, "Stress and Hardship after Prison," 120 Am. J. of Sociology at 1538; *see also* Couloute, Lucius, "Nowhere to Go: Homelessness Among Formerly Incarcerated People," Prison Policy Initiative, at 12 (2018) (study finding that individuals 45 and older were 52% more likely to face housing insecurity than younger counterparts upon release).[20] This 44-and-over population is also the most dependent on public benefits, Western, "Stress and Hardship after Prison," 120 Am. J. of Sociology at 1529, and "shelters or transitional housing programs," *id.* at 1535. Thus, juveniles incarcerated for a mandatory minimum of 30 years face an increased probability of "[e]strangement from family, housing insecurity, and income poverty" and resulting placement "at the margins of society with little access to the mainstream social roles and opportunities that characterize full community participation," *id.* at 1515. In sum, such a sentence exacts a severe physical and psychiatric toll on a juvenile offender, one that greatly diminishes the prospects for a full and productive life upon release. For these reasons,

[20]Comer's prospective reintegration would not pose these sorts of generalized concerns because, as was evidenced at his resentencing, Comer has rehabilitated himself and put together a plan with the assistance of former Governor James McGreevey and the New Jersey Reentry Corporation that would provide for his successful reintegration upon release. *See* A77-83.

the sentence required by N.J.S.A. 2C:11-3b(1) must be considered extremely harsh punishment, particularly as applied to juveniles.

(d) ***The recognized purposes of punishment do not support a mandatory penalty of at least 30 years without parole for juveniles.***

Nor can imposing a mandatory minimum sentence of 30 years without parole on juveniles be justified by any valid penological purpose. That is because each of the four accepted rationales for punishment — retribution, deterrence, incapacitation, and rehabilitation — is incapable of justifying the sentence mandated by N.J.S.A. 2C:11-3b(1) for every case. First, with regard to retribution, as the Supreme Court recognized, the diminished culpability of juveniles means that, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 560 U.S. at 71 (citation omitted).[21] Likewise, with respect to deterrence:

[21]*Graham* analyzed the purposes of punishment in the context of a juvenile non-homicide offender sentenced to life without parole, concluding "[none of the penological rationales] provides an adequate justification." 560 U.S. at 71. "But none of what [*Graham*] said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime-specific. Those features are evident in the same way, and to the same degree, when . . . a botched robbery turns into a killing," *Miller*, 567 U.S. at 473, exactly as occurred in Comer's case when one looks, as one can where no mandatory sentence applies, to the specific facts of a given case. And just as the mitigating features of youth undermine the purposes of punishment regardless of the charged offense, so, too, do they apply to all harsh punishments, whether life without parole in *Graham* and *Miller*, the functional equivalent of life without parole in *Zuber*, or the 30-year without parole mandatory minimum sentence at issue here. *See People v. Holman*, 91 N.E.3d 849, 861 (Ill. 2017) (in holding *Miller* applicable to discretionary life without parole sentences for

> "[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence." Because juveniles' "lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions," they are less likely to take a possible punishment into consideration when making decisions.
>
> [*Id.* at 571-72 (citation omitted).[22]]

As for the incapacitation rationale, this can only justify a 30-year mandatory minimum sentence for juveniles if 30 years imprisonment is generally necessary to protect the public from juveniles convicted of murder. *See Graham*, 560 U.S. at 73 (holding incapacitation rationale could justify life without parole for juvenile nonhomicide offenders only if that category of juveniles would pose a continuing risk of criminality for their natural

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juveniles, underscoring the "Supreme Court's far-reaching commentary about the diminished culpability of juvenile defendants, which is neither crime- nor sentence-specific"); *State v. Lyle*, 854 N.W.2d 378, 399 (Iowa 2014) (barring all mandatory minimum sentencing for juveniles, and noting, "the Supreme Court has emphasized that nothing it has said is 'crime-specific,' suggesting the natural concomitant that what it said is not punishment-specific either").

[22]This fact is encoded in New Jersey's juvenile criminal code at N.J.S.A. 2A:4A-44d(1)(a), (b), which makes the maximum penalty for felony-murder 10 years, while the maximum penalty for knowing/purposeful murder is 20. There is no such distinction in the adult criminal code, demonstrating that the New Jersey Legislature recognizes that juveniles have less foresight and diminished judgment, requiring a lesser sentence. This is further "objective indicia" that the 30-year mandatory sentence, without the possibility of parole, imposed on Mr. Comer, who was convicted of felony murder (and was not himself the trigger person), is not constitutionally justifiable.

lives). But to the contrary, established research demonstrates that the overwhelming majority of juvenile defendants, including those convicted of homicide, will not engage in continuing criminal conduct for anywhere near 30 years. Instead, well-established research reveals an "age-crime curve," showing that juveniles cease to pose a risk of recidivism well before 30 years from their initial offense conduct:

> [M]ost forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence (the peak age varies depending on the specific type of risky activity) and declining thereafter. Involvement in violent and nonviolent crime also follows this pattern and is referred to as the "age-crime curve."
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> [Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 Neuroscience 513, 515 (2013)].

Accord Terrie E. Moffitt, "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy," 100 Psych. R. 674, 675 (1993) ("When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood."); *see also* Jeffery T. Ulmer & Darrell Steffensmeier, "The Age and Crime Relationship: Social Variation, Social Explanations, The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality," at 393-94 (Kevin M. Beaver, *et al.*,

eds. 2015) ("Age is a consistent predictor of crime, both in the aggregate and for individuals. The most common finding across countries, groups, and historical periods shows that crime – especially 'ordinary' or 'street' crime – tends to be a young person's activity.") (citing numerous longitudinal and cross-sectional studies).

Indeed, research demonstrates that a sizeable portion of all offenders, including juveniles, are "immediate desisters," *i.e.* individuals whose first offense is also their last. *See* Megan C. Kurlycheck, *et al.*, "Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study," 50 Criminology 71, 98 (2012) (citing longitudinal studies showing that between approximately one quarter to one half of offenders desist after their first offense); *see also* Maynard L. Erickson, "Delinquency in a Birth Cohort: A New Direction in Criminological Research," 64 J. Crim. L. & Criminology 362, 364 (1973) (empirical study of 9,945 juvenile delinquents finding that "46 percent were classified as one-time offenders") (citing Marvin E. Wolfgang, *et al.*, *Delinquency in a Birth Cohort* (1972)). And of those juveniles who do not desist immediately, the vast majority do so within a few years of adolescence, such that by their mid-to-late 20's, only a small minority of juvenile offenders (10-15%) continue to engage in criminal behavior. *See* Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 680 (estimating

desistance by mid-to-late 20's at 85%); Steinberg, "The Influence of Neuroscience," 14 Neuroscience at 516 (estimating same at 90%). As to the minority (10-15%) who persist in criminality into and during their 30's, research shows a final wave of desistance in the early 40's, beyond which only 5-6% of former juvenile offenders remain at all likely to recidivate. *See* John H. Laub & Robert J. Sampson, "Understanding Desistance from Crime," 28 Crime & Justice 1, 17 (2001) (describing the small group of "persistent offenders" who remain criminally active, "[a]fter their early 40s, [] their termination [from criminal activity] rates are quite high") (internal citation omitted); Andrew Golub, "The Adult Termination Rate of Criminal Careers," Paper, Carnegie Mellon Sch. of Urban and Public Affairs at 6 (1990)[23] (discussing "the over 40 'burn-out' period during which offenders terminate criminal activity at an increasing rate"). Thus, ultimately only 5-6% of those who commit criminal offenses in adolescence are engaged in criminality 30 years later. Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 676 (identifying "the most persistent" offenders as between "5% or 6%" based on empirical study); Alfred Blumstein, *et al.*, "Delinquency Careers: Innocents, Desisters, and Persisters," 6 Crime & Justice 195 (1985) (finding persistent offenders constituted 5.66% of sample in empirical

[23]*Available at* https://www.ncjrs.gov/pdffiles1/Digitization/132878NCJRS.pdf

study).[24] Critically, this pattern holds equally across offense types, including in the case of violent offenders. *See* Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 680 (age-crime curve "obtains among males and females, for most types of crimes, during recent historical periods, and in numerous Western nations") (internal citation omitted); Laub & Sampson, "Understanding Desistance," 28 Crime & Justice at 52 ("What is also striking . . . is that there appear to be no major differences in the process of desistance for nonviolent and violent juvenile offenders.") (internal citations omitted).

As a result, incarcerating a juvenile offender until his mid-to-late 40's in every case – as N.J.S.A. 2C:11-3b(1) requires – cannot be justified under the incapacitation rationale. Rather, empirical evidence demonstrates that for approximately 95% percent of juvenile homicide offenders, 30 years of incarceration is unnecessary to safeguard against recidivism. *See* Moffitt,

[24]The relatively early age at which most juvenile offenders desist from crime has also been demonstrated through research into average criminal career length. From first to last offense, regardless of the type of crime, the average criminal career is between 5 and 15 years. *See* Alex R. Piquero, *et al.*, "The Criminal Career Paradigm," 30 Crime & Justice 359, 435 (2003) ("Three major studies in the 1970s estimated career lengths to be between five and fifteen years.") (internal citations omitted); Alfred Blumstein, *et al.*, *The Duration of Adult Criminal Careers* 10 (1982) ("The most methodically sophisticated attempt to estimate career lengths . . . . suggest that adult criminal careers for index offenses other than larceny follow an exponential distribution between ages 18 and 40 with a mean total length between 8 and 12 years.") (internal citations omitted).

"Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 676; Blumstein, *et al.*, "Delinquency Careers," 6 Crime & Justice 195. Rather, the extent to which the incapacitation rationale justifies a particular length of sentence must be the subject of an individualized determination.[25]

Finally, with regard to the rehabilitation rationale, as a general matter, prison does not provide inmates with the services most critical to desist from crime and succeed in society. *See, e.g.*, N.J. Reentry Corporation, Report, "Improving Upon Corrections in New Jersey to Reduce Recidivism and Promote Successful Reintegration," at 24-25 (2017) (noting importance of services in fields of "employment and training, housing, licensing, drug and addiction treatment, healthcare access, mentoring, cognitive behavior therapy, education, and legal aid," and stating, "[d]espite an urgent need for reentry services, individuals are denied access while still in custody of [the New

[25]The few juvenile offenders who will persist with criminality beyond 30 years will be identifiable through individualized consideration, including through the parole process, looking, for example, to their institutional records. Indeed, determining an offender's particular risk of recidivism, based on evidence of institutional discipline, is precisely what the parole process is designed to do. *See Trantino v. New Jersey State Parole Bd.*, 154 N.J. 19, 30 (1998) ("The test for parole fitness . . . we repeat, is whether there is a substantial likelihood the inmate will commit a crime if released on parole. Rehabilitation is relevant under that test only as it bears on the likelihood that the inmate will not again resort to crime. It need not be total or full or real rehabilitation in any sense other than there is no likelihood of criminal recidivism.").

Jersey Department of] Corrections, which often results in not receiving any aid at all").[26] Thus, there is little reason to believe that a lengthier prison sentence, let alone one of at least 30 years in every case, better promotes the rehabilitation rationale — and some reason to believe lengthy sentences may have the opposite effect. *See* Francis T. Cullen & Paul Gendreau, "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects," in *Policies, Processes, and Decisions of the Criminal Justice System*, Vol. 3, at 155 (2000) (citing meta-analyses of numerous empirical studies showing that "even when the risk level of offenders is taken into account, those sent to prison have a *higher* rate of recidivism than those given community sanctions. Indeed, it appears that longer prison sentences are associated with *greater* criminal involvement, with offenders in the 'more imprisonment' category having a recidivism rate 3 percentage points higher than those in the 'less imprisonment' category") (emphasis added); *cf. Tapia v. United States*, 564 U.S. 319, 330-32 (2011) (holding that in passing the federal Sentencing Reform Act, 98 Stat. 1987, Congress sent a clear message to the Judiciary: "Do not think about prison as a way to rehabilitate an offender," and accordingly interpreting 18 U.S.C. § 3582(a) to "preclude

[26] *Available at* http://njreentry.org/wp-content/uploads/2017/03/NJRC_CorrectionsReport.pdf

sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation").[27]

Nonetheless, as the sociological research cited above demonstrates, whatever the failings of the prison system to foster rehabilitation, all but a small minority of youthful offenders age out of criminal behavior well before 30 years in any event. In other words, for the vast majority of juveniles, rehabilitation will be achieved in significantly less time than N.J.S.A. 2C:11-3b(1) mandates. *See Lyle*, 854 N.W.2d at 400 ("As much as youthful immaturity has sharpened our understanding to use care in the imposition of punishment of juveniles, it also reveals an equal understanding that reform can come easier for juveniles without the need to impose harsh measures. Sometimes a youthful offender merely needs time to grow."); *see also* Blumstein, *et al.*, *The Duration of Adult Criminal Careers*, at 72 ("The generally short length of [criminal] careers means that . . . comparatively short periods of incarceration [are sufficient]."). Accordingly, the rehabilitative rationale, like the other recognized purposes of punishment, fails to justify a mandatory minimum sentence of 30 years without parole for juveniles, to be imposed in every case regardless of the particular facts and circumstances.

[27]As previously noted, Dr. Dudley specifically testified at Comer's resentencing hearing that Comer would not benefit from additional incarceration because he presently poses no greater risk to society than does any member of the general public. 2T at 64:9-18.

(e) ***Caselaw both within and beyond New Jersey confirms that a mandatory minimum sentence of 30 Years for juveniles is unconstitutional.***

Though the question presented here was not squarely addressed in either *Miller* or *Zuber*, both decisions support Comer's position, as do decisions from several other jurisdictions. Thus, *Miller* called the "foundational principle" of its juvenile sentencing jurisprudence "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children," 567 U.S. at 474, striking down the mandatory punishment there at issue because "mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it," at 477. The Court reinforced this point in *Jones*, noting, that *Miller* applied the "simple proposition" that "[y]outh matters in sentencing" by holding "that a sentencer must have discretion to consider youth before imposing a life without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence." Slip. Op. at 10. And in *Zuber*, this Court held that "judges must evaluate the *Miller* factors" — *i.e.*, conduct an individualized sentencing that accounts for, among other factors, youth and attendant circumstances — "when they sentence a juvenile to a lengthy period of parole ineligibility." 227 N.J. at 447. Because 30 years without parole is just such a "lengthy period of parole ineligibility,"

such a sentence should only be able to be imposed pursuant to an individualized, discretionary sentence, and not as a matter of mandate under N.J.S.A. 2C:11-3b(1).

Indeed, this Court has made this clear, relying on *Zuber* in holding unconstitutional N.J.S.A. 2C:7-2(g), which "impose[d] categorical lifetime registration requirements for certain sex offenses," as applied to juveniles. *C.K.*, 233 N.J. at 56. Beginning from the premise that, following *Zuber*, "juveniles do not possess immutable psychological or behavioral characteristics" but instead "are works in progress and [] age tempers the impetuosity, immaturity, and shortsightedness of youth," the Court held lifetime registration for juvenile sex offenders unconstitutional. *Id.* at 74. Specifically, the Court held that the statute at issue created an "irrebuttable presumption [that] disregards any individual assessment" in defiance of "scientific and sociological studies [and] our jurisprudence," rendering the statute devoid of any rational basis. *Id.* at 74-75. In doing so, the Court made clear that the unique deficits of juveniles, coupled with their increased capacity for reform, render mandatory sentencing provisions (even those other than life without parole and its functional equivalent) inappropriate for juveniles.

Nor was this Court alone in so holding. To the contrary, authorities from other jurisdictions have similarly banned mandatory penalties short of life without parole as applied to

juveniles. *See, e.g., Lyle*, 854 N.W.2d at 402 (holding all mandatory minimum sentences for juveniles unconstitutional and stating, "*Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults"); *State v. Houston-Sconiers*, 391 P.3d 409 (Wa. 2017) (holding all mandatory minimum sentences for juveniles unconstitutional, stating, "[i]n accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system . . . . To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled"); *State v. Dull*, 351 P.3d 641, 660 (Kan. 2015) (holding "mandatory lifetime postrelease supervision [] categorically unconstitutional under *Graham* when imposed on a juvenile" convicted of particular sex offenses because "the same factors that result in a diminished culpability for juveniles . . . . all diminish the penological goals of lifetime supervision for juvenile sex offenders"); *see also Jones*, Slip. Op. at 11 ("*Miller* required a discretionary sentencing procedure . . . . [because] a mandatory life-without-parole sentence for an offender under 18 'poses too great a risk of disproportionate punishment.') (quoting *Miller*, 567 U. S. at 479).

These authorities, and the proportionality analysis discussed above, establish that the mandatory sentencing scheme set forth in N.J.S.A. 2C:11-3b(1) is unconstitutional as applied to juveniles. Because a mandatory sentence of 30 years without parole was imposed upon Comer here, his sentence should be vacated and the matter remanded for resentencing.

(f) ***Comer's case is a powerful example of why, as a matter of constitutional law, individualized, discretionary sentencing for juveniles convicted of murder is required.***

The excessiveness of a mandatory term of 30 years without parole for every juvenile convicted of murder is no mere abstract proposition: it is evident in Comer's particular case. Thus, the uncontested proof at resentencing showed that Comer was born into a traumatic environment marked by instability, abuse, and neglect, where drug use, criminality, and violence were Comer's only reality. 4T at 79:22-24 (resentencing court stated, "[t]his Court finds that the Defendant grew up in an environment that forced his criminal behavior."). These circumstances damaged Comer, compounding the usual developmental shortcomings of youth:

> [H]is life experiences were such that it made it all the more difficult for him to develop the capacity to objectively assess his situation and the problems that he was facing, and also made it all the more difficult for him to develop the capacity to come up with reasonable, hypothetical alternatives for responding to his situation or the problems he was facing. For example, as a result of his trauma-related over-reactivity and the impulsivity that was characteristic of his

> other developmental difficulties, it was all the more difficult for him to slow down and hold whatever options he might have come up with in his head long enough to weigh the pros and cons of those options. And of course, for example, as a result of those same difficulties it was also more difficult for him to identify and select the best option and then make a plan to implement that option.
>
> [CA64 (Expert Report of Dr. Richard J. Dudley, Jr.).]

But time has "demonstrate[d] the truth of *Miller*'s central intuition — that children who commit even heinous crimes are capable of change." *Montgomery*, 577 U.S. at 216. Thus, the resentencing court found that after over 18 years in prison, "Defendant has shown an ability to be rehabilitated." 4T at 80:3. This finding was well-supported, including by Comer's participation in numerous programs, among them mentorship and spiritual activities, as well as the absence of any disciplinary infractions over several years, *id.* at 74:15 - 75:12, and the uncontested testimony of his examining psychiatrist that "more time [would not] make him safer," 2T at 64:9-10. Indeed, at the time of Comer's resentencing, he had formulated a reentry plan with the assistance of former Governor James McGreevey and the New Jersey Reentry Corporation, which included provisions for training as a carpenter, immediate housing assistance, mentorship, and other means of essential support. A77-83.

Given this proof, an appropriately individualized, discretionary decision of either the trial court or the Parole Board would have provided for Comer's prompt release from prison. That is because the principles underlying modern juvenile sentencing law, coupled with the evidence before the court, made plain that Comer's continued incarceration cannot be justified by any penological rationale. Yet Comer now stands compelled to serve an additional term of 12 years by virtue of N.J.S.A. 2C:11-3b(1)'s mandatory minimum sentencing provision — a purposeless and disproportionate punishment that will serve only to delay Comer's reentry and deprive him of further time to achieve the "fulfillment outside of prison walls" of which he is so clearly capable. *Graham*, 560 U.S. at 75. In sum, Comer exemplifies the constitutional flaw of applying the mandatory sentencing provision of N.J.S.A. 2C:11-3b(1) to juveniles, and the Court should accordingly vacate and remand so that Comer may be sentenced based not upon some mandatory scheme but instead, in accord with his personal circumstances, rehabilitation, and potential for redemption.

II. THE APPELLATE DIVISION'S DECISION WAS LEGAL ERROR. (12a-32a)

The Appellate Division upheld the constitutionality of N.J.S.A. 2C:11-3b(1) on two bases: reliance on *Pratt*, 226 N.J. Super. 307, and deference to the Legislature. Both bases led the court into error. *Pratt*, which is not binding on this Court, was

decided in a vastly different era and reflects a "'just deserts' approach to juvenile crime," *id.* at 327 — an approach roundly rejected by the subsequent sea change in juvenile sentencing law. Nor was the Appellate Division correct that Comer's challenge should be resolved by the Legislature. Constitutional adjudication is, of course, the province of the Judiciary, and this Court has not shied from resolving difficult questions to protect the constitutional rights of New Jerseyans, including those convicted of the State's worst crimes. Accordingly, the Appellate Division's reasoning cannot stand and should be reversed.

(a) State v. Pratt *is neither binding nor persuasive and should be reversed.*

The Appellate Division held that "*Pratt* is directly on point and remains good law." *Comer*, 202 WL 2179075, at *8. As a preliminary matter, the decision of the Appellate Division in *Pratt* is, of course, "not binding upon this court." *New Amsterdam Cas. Co. v. Popovich*, 18 N.J. 218, 224 (1955). But neither is it persuasive.

Pratt, which upheld N.J.S.A. 2C:11-3b(1) as applied to juveniles, was decided 33 years ago. But challenges under the Eighth Amendment and Article I, Paragraph 12 must "look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58

(internal citations and quotation marks omitted). Courts must therefore revisit and reverse prior decisions where societal consensus and scientific understanding have evolved. *See*, *e.g.*, *Roper*, 543 U.S. 551 (reversing *Stanford v. Kentucky*, 492 U.S. 361 (1989), decided 16 years earlier, in barring capital punishment for juveniles); *Atkins v. Virginia*, 536 U.S. 304, 307, 314 (2002) (reversing *Penry v. Lynaugh*, 492 U.S. 302 (1989), decided 13 years earlier, in barring capital punishment for individuals with intellectual disability, noting, "much has changed").

In this case, "much has changed" since *Pratt*. The intervening decades have seen a transformation in the constitutional law of juvenile punishment, manifested in the Supreme Court decisions in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Jones*, as well as this Court's decisions in *Zuber* and *C.K.* Indeed, *Pratt* itself made clear that it was writing on a completely blank slate. 226 N.J. Super. at 326 (acknowledging, "our research has disclosed no reported New Jersey decision pertaining specifically to juveniles"). But the slate is no longer blank; instead, it is filled with modern decisions rooted in recent, empirical research showing fundamental differences in the maturity, decision-making, susceptibility to peer-pressure, and capacity for change of juveniles as compared to adults. And those differences render juveniles less culpable for even the most serious offenses, undermining the conventional justifications for punishment. *See*

supra at 15-19. Further, in the wake of this jurisprudence and the underlying science, society has embraced limits on mandatory sentences imposed upon juveniles, revealing an emerging but strong consensus that there should be at least the possibility, based upon individual circumstances, of eligibility for release well before serving 30 years. *See supra* at 21-24. In short, *all* the relevant considerations under the requisite proportionality review have changed since *Pratt* was decided, making that decision obsolete.

Indeed, *Pratt* relied on law and societal norms that have since been outright rejected. For example, the *Pratt* defendant argued that N.J.S.A. 2C:11-3b(1) violated the requirement of individualized sentencing articulated in the death penalty context, citing *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). The Appellate Division held those decisions "plainly inapposite" because "'[d]eath as a punishment is unique in its severity and irrevocability.'" *Pratt*, 226 N.J. Super. at 325 (citation omitted). But *Miller* expressly disclaimed any such distinction, holding that "if 'death is different,' children are different too," and citing *Woodson* to support its requirement of individualized sentencing. *Miller*, 567 U.S. at 475, 481. As noted, the Supreme Court further adhered to that same principle in *Jones*. *See* Slip. Op. at 9 ("*Miller* . . . required a sentencing procedure similar to

the procedure that this Court has required for the individualized consideration of mitigating circumstances in capital cases such as *Woodson*[.]").

Further, *Pratt* justified its holding in light of "public concern about unrehabilitated, violent youthful offenders [that] ha[d] 'stimulated a 'just deserts' approach to juvenile crime.'" 226 N.J. Super. at 326 (citations omitted). But since *Pratt*, both scientific research and objective indicia of societal values have turned away from the so-called "superpredator myth," recognizing it as not only unfounded but, worse, a product of invidious racial stereotypes. *See* Equal Justice Initiative, Report, "The Superpredator Myth, 20 Years Later" (2014)[28]; *see also* Amicus Curiae Br. of Jeffrey Fagan, *et. al* in Supp. of Pet. in *Miller v. Alabama*, 567 U.S. 460 (2012), 2012 WL 174240, at *37 (academics who first promulgated "the superpredator myth" expressed regret for advancing a theory that "threw thousands of children into an ill-suited and excessive punishment regime"). Thus, the modern revolution in juvenile sentencing reflects a movement away from the retributive approach *Pratt* endorsed, underscoring instead the primacy of rehabilitation and second chances, based upon the individual facts of a given case. *See Zuber*, 227 N.J. at 446 (calling "the essence" of the decision in *Montgomery* that juveniles

[28]*Available at* https://eji.org/news/superpredator-myth-20-years-later/

"must be given the opportunity to show their crime did not reflect irreparable corruption" so that they may be released); *Miller*, 567 U.S. at 478 (requiring individualized sentencing because "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Graham*, 560 U.S. at 79 (decrying LWOP for juvenile nonhomicide offenders because it leaves "no chance for fulfillment outside prison walls, no chance for reconciliation with society"). In sum, *Pratt* does not reflect the current state of the law, let alone contemporary standards of decency, all these years later. It should rejected. Instead, conducting its own proportionality review as informed by modern law, science, and social consensus, this Court should hold that a 30-year mandatory minimum sentence for juveniles fails to pass constitutional muster.

(b) *This Court should resolve the fundamental constitutional question presented here.*

The Appellate Division held that "the actions (and inactions) of our Legislature" support N.J.S.A. 2C:11-3b(1)'s continued application to juveniles, and that "debate over applying the thirty-year minimum to juvenile murderers should [accordingly] proceed in the Legislature." *Comer*, 2020 WL 2179075, at *10, *11. This approach fundamentally misconstrues the role of the Judiciary in our constitutional system. Both the Federal and State Constitutions limit the power of the Legislature, which limits the

Judiciary has the authority and obligation to enforce as a matter of its power of judicial review. *See State v. Buckner*, 223 N.J. 1, 52 (2015) ("In the end, this Court is the final arbiter of the Constitution. . . . That is a lesson passed on to us from the landmark case of *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803), which stands for the bedrock principle of judicial review and the primacy of the Constitution over legislation."); *DePascale v. State*, 211 N.J. 40, 43 (2012) ("Because one of the core functions of the judiciary is to serve as the guardian of the fundamental rights of the people — rights enshrined in the Constitution — the judiciary, at times, must restrain legislative initiatives . . . that may threaten those rights and violate the Constitution."). That duty is no less essential in the context of determining whether a particular punishment is cruel and unusual under Article 1, Paragraph 12 or the Eighth Amendment. *See Trop v. Dulles*, 356 U.S. 86, 103 (1958) (applying the Eighth Amendment to strike down a legislative enactment because, "[t]he provisions of the Constitution are not . . . hollow shibboleths. . . . They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules."); *Gerald*, 113 N.J. at 89 (striking down application of death penalty to a particular type of offense under Article 1, Paragraph 12).

That this Court in *Zuber* initially asked the Legislature to demarcate a term of years by which a juvenile would necessarily receive "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" does not diminish the Court's constitutional duty now. 227 N.J. at 452-53 (quoting *Graham*, 560 U.S. at 75). *Zuber* rightly foresaw that sentencing a juvenile to a "lengthy period of parole ineligibility" would "raise serious constitutional issues" if the juvenile could later establish that he had been rehabilitated but remained ineligible for release. *Id.* But because such a claim was not then before the Court, *Zuber* appropriately referred the matter to the Legislature "[t]o avoid a potential constitutional challenge in the future[.]" *Id.* at 452 ("We cannot address such a claim now."). The Legislature, however, has failed to act, and now the challenge that *Zuber* foresaw is squarely presented.

This Court has never hesitated to act in the face of legislative inaction where constitutional rights are implicated, even when it first provided the Legislature with the opportunity to address the issue. *See, e.g., S. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Twp.*, 92 N.J. 158, 212, 213 n.7 (1983) (*Mount Laurel II*) (Court would "exercise [its] traditional constitutional duty" though the issue was "especially appropriate for legislative resolution" because "enforcement of constitutional rights cannot await a supporting political consensus."); *see Robinson v. Cahill*,

69 N.J. 133, 147 (1975) ("'[J]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence.'") (quoting *Marbury*, 1 Cranch at 163); *see also Abbott v. Burke*, 100 N.J. 269, 282 (1985) ("[W]hen legislative inaction threatens to abridge a fundamental right . . . , the judiciary must afford an appropriate remedy").

Nor should the Court hesitate to act now. Where, as here, Comer squarely presents a claim that his mandatory sentence is unconstitutional, deference is improper, and the Court should instead afford a remedy consistent with its constitutional obligation. Applying the requisite proportionality review in the manner described above, the Court should accordingly hold the mandatory sentencing provision of N.J.S.A. 2C:11-3b(1) disproportionate in the case of juveniles.

CONCLUSION

For the foregoing reasons, this Court should hold N.J.S.A. 2C:11-3b(1) unconstitutional as applied to juveniles, vacate Comer's sentence, and remand for resentencing consistent with the Court's decision.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Attorney ID No. 023131983
GIBBONS P.C.

Alexander Shalom, Esq.
Attorney ID No. 021162004
Jeanne LoCicero, Esq.
Attorney ID No. 024052000
American Civil Liberties Union of New Jersey

Avram D. Frey, Esq.
Attorney ID No. 188002016

Counsel for Petitioner James Comer

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STATE OF NEW JERSEY, Respondent, VS. JAMES ZARATE, Appellant.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 084516 Criminal Action On Appeal From: Superior Court of New Jersey, Appellate Division Honorable Judges Jack M. Sabatino, Thomas W. Sumners, Jr., and Richard J. Geiger Docket No.: A-2001-17T3

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY ON BEHALF OF APPELLANT JAMES ZARATE

Lawrence S. Lustberg
(Attorney ID No. 023131983)
GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
llustberg@gibbonslaw.com

Alexander Shalom
(Attorney ID No. 021162004)
Jeanne LoCicero
(Attorney ID No. 024052000)
ACLU New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714
ashalom@aclu-nj.org

Avram D. Frey
(Attorney ID No. 188002016)
1145 Poquito Street
Austin, Texas 78702
(646) 229-4385
avidfrey@gmail.com

Counsel for Amicus Curiae *the American Civil Liberties Union of New Jersey*

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of New Jersey (ACLU-NJ) sought leave and was granted permission to participate in this matter before the New Jersey Superior Court, Appellate Division based upon the ACLU-NJ's long-standing commitment to protecting the rights of juveniles given their unique vulnerabilities and capacity for reform. That interest is set forth in detail in the ACLU-NJ's Motion for Leave to Participate before the Appellate Division, incorporated by reference as if fully set forth herein.

INTRODUCTION

This case presents two issues arising out of the Court's landmark decision in *State v. Zuber*, 227 N.J. 422 (2017): 1) how, under Article 1, paragraph 12 of the New Jersey Constitution, the five factors listed in *Miller v Alabama*, 567 U.S. 460, 477-78 (2012), are to be applied in sentencing juveniles; and 2) at what point, under the State Constitution, must a juvenile be afforded an opportunity to demonstrate maturity and rehabilitation so that he may be released.

In *Miller*, the United States Supreme Court held that juveniles convicted of homicide may not be sentenced to life without parole absent consideration of five factors:

> "chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences";
>
> "the family and home environment";

> "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";
>
> "inability to deal with police officers or prosecutors (including on a plea agreement) or [] incapacity to assist [the juvenile's] own attorneys"; and
>
> "the possibility of rehabilitation."
>
> [567 U.S. at 477-78.]

Zuber went further, holding that under Article 1, paragraph 12, sentencing courts must consider the *Miller* factors when they consider imposing a "lengthy period of parole ineligibility" upon a juvenile, whether for one offense or several. 227 N.J. at 447.

But *Zuber* also recognized that even where a court properly applies the *Miller* factors, the sentence imposed might later prove unconstitutional if the defendant demonstrated maturity and rehabilitation years before becoming eligible for release. *Id.* at 452. Because that issue was not squarely presented, the Court asked the Legislature to provide for "later review of juvenile sentences," citing with approval enactments from other States requiring that such "later review" occur sometime between 15 and 30 years after the commencement of incarceration. *Id.* at 430, 452-53, 452 n.4. The Legislature, however, has since failed to act.

Mr. Zarate's second resentencing now requires the Court to further develop both aspects of the *Zuber* holding. That is so first because the record is clear that the resentencing court

alternatively misconstrued and refused to apply the *Miller* factors, settling on a term of 50 years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. – or 42.5 years without eligibility for parole – because the State recommended it as the likely maximum term allowable by law. *See* 4T29:22-25. But *Zuber* did not direct courts to simply discount the sentence they would otherwise impose in order to comply with some upper limit for juveniles – rather, *Zuber* holds that *Miller* sets forth certain mitigating factors that *must* be given careful consideration and appropriately weighed in determining the overall sentence. Indeed, the recent decision of the United States Supreme Court in *Jones v. Mississippi*, 141 S.Ct. 1307 (2021), reaffirms that requirement, holding that the *Miller* factors are precisely the kind of mitigating evidence that is pertinent to juveniles facing long sentences. And because *Zuber* was decided independently under New Jersey law and our Constitution, the record must reflect proper application of the *Miller* factors for purposes of appellate review, notwithstanding *Jones*' more limited interpretation of the Federal Constitution on this point. Accordingly, this Court should vacate and remand for appropriate consideration of the *Miller* factors.

Second, Zarate's sentence of 42.5 years without parole eligibility requires this Court to take up the task that the Legislature has declined to undertake in the wake of *Zuber*: to draw the constitutional line by which time a juvenile must be

afforded a chance to gain his release by demonstrating maturation and reform. In performing this task, the Court should be guided by established social science research of precisely the type upon which this Court, following the United States Supreme Court, has relied in this area. In this case, the research establishes the fact of an "age-crime curve" whereby even juveniles convicted of serious offenses overwhelmingly age out of crime within 15 years. Thus, the Court can and should draw a principled line at 15 years as the time at which juveniles must be provided a meaningful opportunity to earn their release through demonstrated maturation and reform. Because Zarate's 42.5 years of parole ineligibility well exceeds this marker, for this reason as well, the Court should vacate Zarate's sentence and remand for resentencing.

STATEMENT OF PROCEDURAL AND FACTUAL HISTORY

Amicus adopt the Statements of Procedural and Factual History in Defendant Zarate's opening brief before the Appellate Division. *See* Def. App. Div. Br. at 1-12.

ARGUMENT

I. Zarate's Sentence Should Be Vacated And The Matter Remanded For Appropriate Consideration Of The *Miller* Factors.

This Court's decision in *Zuber* mandates that sentencing courts apply the *Miller* factors to determine an appropriate overall sentence before imposing a "lengthy period of parole ineligibility" on a juvenile. 227 N.J. at 447. In the case of juveniles facing potentially long terms of imprisonment, this

Court has thus been clear that sentencing courts must consider the mitigating evidence under each *Miller* factor in determining a proportionate sentence. The Supreme Court's recent decision in *Jones* confirms this understanding of the purpose of the *Miller* factors. And to the extent that *Jones* held that consideration of the *Miller* factors need not be explicit in the record under the Federal Constitution, that holding is inapplicable here; New Jersey law requires that discretionary decisions impacting the overall sentence *must* be explained in substance on the record, and *Zuber* extended this requirement to application of the *Miller* factors for juveniles facing lengthy terms of incarceration under Article 1, paragraph 12 of the New Jersey Constitution – precisely as *Jones* held that states are free to do as a matter of their own law. Here, because the court below did not properly consider the *Miller* factors in determining Zarate's sentence, the Appellate Division's decision to the contrary should be reversed.

A. *Zuber* requires that courts consider and give weight to the *Miller* factors in determining the appropriate sentence.

In *Zuber*, this Court vacated and remanded with instructions that, "[a]t a new sentencing hearing, the trial court should consider the *Miller* factors when it determines the length of [defendant's] sentence and when it decides whether the counts of conviction should run consecutively," 227 N.J. at 453, "direct[ing] trial judges to exercise a heightened level of care

before imposing multiple consecutive sentences on juveniles," *id.* at 450. *See also id.* at 450 ("[J]udges must do an individualized assessment of the juvenile about to be sentenced — with the principles of *Graham* [*v. Florida*, 560 U.S. 48 (2010)] and *Miller* in mind."). In this manner, the Court made clear that the *Miller* factors are mitigating factors that must be considered and given significant weight in determining an appropriate overall sentence.

In keeping with this understanding of the purpose of the *Miller* factors, the Legislature recently enacted a new statutory mitigating factor (factor 14), requiring sentencing courts to consider whether "[t]he defendant was under 26 years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1b(14). That factor was specifically added in response to a recommendation of the New Jersey Criminal Sentencing and Disposition Commission, *see* A4369, 219th Legis. (June 29, 2020) (Statement), which expressly sought to embody the *Miller* holding in New Jersey law. *See* New Jersey Crim. Sentencing & Disposition Comm'n, Annual Report, at 26 (2019).[1] In this way, the Legislature sought to codify this Court's holding by rendering the characteristics of youth delineated in *Miller* mitigating factors which must be

[1] *Available at* https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf

considered in "determining the appropriate sentence to be imposed[.]" N.J.S.A. 2C:44-1b.

Of course, this requirement flows naturally from *Miller* itself. There, the Supreme Court struck down mandatory life without parole for juveniles precisely because such schemes deprive courts of the ability to construct an individualized, proportionate sentence in relation to a particular defendant's "chronological age and its hallmark features." 567 U.S. at 477; *id.* at 476-77 ("[T]he flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders" are that "every juvenile will receive the same sentence as every other . . . . And still worse, each juvenile . . . will receive the same sentence as the vast majority of adults[.]"); *id.* at 489 ("*Graham*, *Roper* [*v. Simmons*, 543 U.S. 551 (2005)], and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances[.]"). Moreover, *Miller* itself made clear that evidence supporting the *Miller* factors serves an important mitigating purpose and courts must give it great weight, in significant part because the developmental shortcomings of youth apply categorically to *all* juveniles. *Id.* at 479 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."); *see also*

Montgomery v. Louisiana, 577 U.S. 190, ("[*Miller*] established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'") (citation omitted).

In *Jones*, the Supreme Court reaffirmed this understanding of *Miller*. To be sure, *Jones* held that, before sentencing a juvenile to life without parole, a court need neither "make a separate factual finding that the defendant is permanently incorrigible" nor "provide an on-the-record sentencing explanation with [such] 'an implicit finding[.]'" 141 S.Ct. at 1311. But that is so, *Jones* held, because the *Miller* factors are "sentencing factor[s] akin to [] mitigating circumstance[s]," not an "eligibility criterion" for a juvenile sentence of life without parole. *Id.* at 1315; *see also id.* at 1316 ("*Miller* . . . required that a sentencer consider youth as a mitigating factor[.]"). Thus, *Jones* stressed that the purpose of the *Miller* factors is to account for a defendant's youth in sentencing. And *Jones* reiterated that proof under the *Miller* factors is powerful mitigation, citing with approval data showing that *Miller* had "been consequential," "result[ing] in numerous sentences less than life without parole." *Id.* at 1322. In sum, *Jones* is in accord with *Zuber*, and now with the Legislature, in viewing the *Miller* factors as mitigators. Accordingly, courts must consider and give weight to evidence under the *Miller* factors in determining an appropriate sentence for a juvenile facing a

potentially "lengthy period of parole ineligibility." *Zuber*, 227 N.J. at 447.

B. Sentencing courts in New Jersey must make their findings under the *Miller* factors on the record, notwithstanding the United States Supreme Court decision in *Jones*.

Sentencing courts in New Jersey must make consideration of the *Miller* factors explicit on the record. That is, under State law, any exercise of sentencing discretion must be explained and preserved. *See State v. Torres*, 2021 WL 1883923, at *15 (N.J. May 11, 2021) ("[E]xplanation for the overall fairness of a sentence . . . is required . . . in [] discretionary sentencing settings[.]"); *State v. Pillot, 115* N.J. 558, 565 (1989) ("[A] fundamental aspect of the sentencing process is the requirement that judges clearly articulate their reasons for imposing a sentence."); *see also* N.J.S.A. 2C:43-2(e) ("The court shall state on the record the reasons for imposing the sentence . . . ."); *R.* 3:21-4(g)("At the time sentence is imposed the judge shall state reasons for imposing such sentence . . . .").

Moreover, the court's explanation must be substantive, as "[m]erely enumerating factors does not provide any insight into the sentencing decision, which follows not from a quantitative, but from a qualitative, analysis." *State v. Kruse*, 105 N.J. 354, 363 (1987); *see also State v. Fuentes*, 217 N.J. 57, 70 (2014) ("When the trial court fails to provide a qualitative analysis of the relevant sentencing factors on the record, an appellate court

may remand for resentencing."). Such qualitative analysis on the record is "a necessary prerequisite for adequate appellate review." *State v. Miller*, 108 N.J. 112, 122 (1987); *see also Fuentes*, 217 N.J. at 74 ("A clear and detailed statement of reasons is [] a crucial component of the process conducted by the sentencing court, and a prerequisite to effective appellate review."); *Kruse*, 105 N.J. at 360 ("[T]he court must describe the balancing process leading to the sentence. . . . [or else] appellate review becomes difficult, if not futile."). Review on appeal, of course, is essential to ensuring compliance with the "critical sentencing policies of the Code," *i.e.* uniformity, predictability, proportionality, and fairness. *Torres*, 2021 WL 1883923, at *13-15.

Under *Zuber*, as noted, application of the *Miller* factors is a constitutionally mandated exercise of discretion with significant impact on the ultimate sentence. As a result, under New Jersey law, sentencing courts must explain, substantively and in detail, the consideration and weight given to each factor, and that "heightened level of care" must be preserved to ensure compliance with the sentencing Code and Article 1, paragraph 12, through appellate review. *Zuber*, 227 N.J. at 450.

In this regard, New Jersey law, under our Constitution, parts company with the United States Supreme Court's decision in *Jones*. *Jones* held that under the Federal Constitution, "an on-the-record

sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth" because "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth." 141 S.Ct. at 1319. But that *ipse dixit* interpretation of the Eighth Amendment has no effect on *Zuber*, which was explicitly grounded in Article I, paragraph 12 of the New Jersey Constitution, as well.[2] As this Court wrote:

> To satisfy the Eighth Amendment *and* Article I, Paragraph 12 of the State Constitution, which both prohibit cruel and unusual punishment, we direct that defendants be resentenced and that the *Miller* factors be addressed at that time.
>
> [227 N.J. at 429 (emphasis added).]

Indeed, the Court was careful to note that "the State Constitution can offer greater protection in this area," citing *State v. Gerald*, 113 N.J. 40, 76 (1988), further making clear that its holding rested independently on Article 1, paragraph 12. *Zuber*, 227 N.J. at 438. And, as discussed above, such "greater protection" includes New Jersey's unique emphasis on the importance of sentencing courts providing a thorough analysis of discretionary sentencing

[2]Indeed, the *Jones* Court specifically approved of States affording additional constitutional protections to juvenile defendants, noting, "[i]mportantly, . . . our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18," including "requir[ing] sentencers to make extra factual findings" or "direct[ing] sentencers to formally explain on the record" the sentence imposed. 141 S.Ct. at 1323.

decisions on the record – not only because statutes and Rules of Court require it, but also because the development of a record serves as a critical guarantee of fairness and proportionality, in accordance with the New Jersey Constitution. *See*, *e.g.*, *Torres*, 2021 WL 1883923, at *14 ("[W]e require an explicit explanation for the overall fairness of a sentence, in the interest of promoting proportionality for the individual who will serve the punishment.").[3] In sum, irrespective of *Jones*, sentencing courts in this State must make detailed, qualitative application of the *Miller* factors a matter of record.

C. The resentencing court did not properly apply the *Miller* factors.

The court below did not apply the *Miller* factors to determine an appropriate sentence, as *Zuber* requires. 227 N.J. at 450, 453. Instead, the court cited irrelevant considerations and ignored pertinent evidence, ultimately giving no weight to any factor associated with youth even though Zarate was only 14 at the time of offense.

Initially, the court inappropriately discounted the first *Miller* factor, Zarate's "chronological age," "immaturity," and

[3]Indeed, *Jones* supported its conclusion by adding that "many States traditionally have not legally required (and some States still do not legally require) on-the-record explanations by the sentencer[.]" *Id.* at 1321. But that is not so in New Jersey, which certainly does. *See* N.J.S.A. 2C:43-2(e); *R.* 3:21-4(g); *Miller*, 108 N.J. at 122 (1987); *Fuentes*, 217 N.J. at 74; *Kruse*, 105 N.J. at 360.

"impetuosity," *Miller*, 567 U.S. at 477, because Zarate's defense strategy suggested intelligence. 4T55:22 – 56:4 (describing Zarate, based on a trial stipulation, as "[c]unning," and contending that, "it shows once again that he's bright which . . . doesn't negate *Miller* factor one but reduces some of its forcefulness"); *id.* at 65:13-19 ("Zarate . . . was familiar with the current proceedings as to juvenile sentencing as well as other issues . . . . Once again, he's bright. That[] relates to . . . *Miller* factor[] one[.]"); *id.* at 75:9-11 ("[T]he defendant's intelligent cunning, mitigates against the circumstances set forth in the first *Miller* factor."). But, even assuming that the actions at issue were as crafty as the court believed, such technical aspects of Zarate's defense cannot fairly be attributed to Zarate himself for purposes of the *Miller* inquiry. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."); *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295 (1971) ("[T]he untrained defendant is in no position to defend himself . . . even where there are no complexities[.]"). Moreover, the pertinent social science teaches that even if Zarate was a bright 14-year-old, this says nothing about his immaturity or impetuosity. *See* Lawrence D. Cohn & P. Michiel Westenberg, "Intelligence and Maturity: Meta-Analytic Evidence for the Incremental and Discriminant Validity of Loevinger's Measure of Ego Development,"

86 J. of Personality & Social Psych. 760, 767 (2004) (meta-analysis of 42 studies involving over 5600 participants concluded "unequivocally" that "intelligence" and "impulse control, perspective taking, [and] self-reflection," are "conceptually and functionally distinct concepts.").

Meanwhile, the court disregarded the most relevant proof – that Zarate was only 14 – because the defense presented no expert to confirm that the "hallmark features" of youth applied to Zarate. *See* 4T62:14-18 (examining psychiatrist provided "no evidence of . . . any indicia of what I am to consider under *Miller* factor one[.]"); *id.* at 66:9-14 ("There was nothing specific by way of testing or otherwise that was provided about the defendant's lack of brain development[.]"). But this holding ignores the *legal significance*, under the precedents of the Supreme Court and now of this Court, of the fact that Zarate was only 14 years old. That is, individualized proof that youth affected Zarate's actions is not necessary for purposes of the first *Miller* factor, especially in the case of a 14-year-old. Rather, the modern revolution in juvenile sentencing is premised on "[t]hree *general* differences," well-established in the literature, that are common to all adolescents. *Roper*, 543 U.S. at 569 (citing "scientific and sociological studies") (emphasis added); *accord Miller*, 567 U.S. at 472 n.5 ("'[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen

the Court's conclusions' [in *Roper* regarding the ways in which all juveniles are different].") (citation omitted). Accordingly, the trial court should have accorded significant weight to the first *Miller* factor. *See State v. Roby*, 897 N.W.2d 127, 145 (Iowa 2017) ("The [first *Miller*] factor draws upon the features expected to be exhibited by youthful offenders that support mitigation" and is "the basis for the core constitutional protection extended to juvenile offenders").

The court's application of the other *Miller* factors followed the same pattern. Considering the second factor, the "family and home environment," *Miller*, 567 U.S. at 477, the court assigned no weight because, *inter alia*, Zarate's family "rall[ied] in support of the defendant," 4T at 66:23, including by writing letters at resentencing, *id.* at 54:14-17; the court thus treated the family's provision of relevant evidence as undermining this factor, making it essentially unprovable. Nor does the family's "support" at sentencing have any bearing on whether a "pathological background might have contributed to a 14-year-old's commission of a crime." *Miller*, 567 U.S. at 479-80. More pertinent was proof concerning "the trauma of [Zarate's] mother's seventh-month miscarriage and the separation of his parents," but the court treated presentation of this history only as more evidence of cunning, which again, the court held against Zarate. 4T at 52:21-24 (responding to Zarate's description of familial trauma, "[t]he point is that this was and

is a bright and intelligent individual."). Astoundingly, the court even found the second mitigating factor undermined by an inference that Zarate's family assisted in covering up the murder. *Id.* at 57:14-25 ("[W]hat about the clean up of the blood, which it's acknowledged existed? . . . . And what about the odor from the bleach . . . and other materials that were used to clean up? Are we to believe that they would go unnoticed by his family, especially the odor? That plays into *Miller* factor two."). Certainly such an inference suggests a "dysfunctional" home environment, not a secure one. *Miller*, 567 U.S. at 477.

As for the third *Miller* factor, the defendant's role in the offense and the extent of "familial and peer pressures," *Miller*, 567 U.S. at 477, the incontrovertible proof was that Zarate committed the offense with an older brother whom "he had looked up to" and who "cared for him like a father after the [parents'] divorce." *State v. Zarate*, 2020 WL 2179126, at *13 (App. Div. May 6, 2020). The court found this factor foreclosed, however, because Zarate's defense at trial – that he was not a party to the murder but only the cover-up – had failed. 4T at 68:18-19 ("[T]he jury has already decided that for me."). Yet the jury's verdict says nothing about the role of sibling pressure in Zarate's participation in the murder. On this latter point, the court said only that, "[Zarate] requested his attorney to file certain motions and . . . make certain objections," concluding, "[t]his defendant's

not a follower." *Id.* at 54:19-24.[4] But this statement demonstrates a complete failure to consider how Zarate's relationship to his brother impacted his offense conduct.

Regarding the fourth *Miller* factor, the ways that youth handicaps a defendant in the criminal system, *Miller*, 567 U.S. at 477, the court also assigned no weight, again improperly, and without basis, attributing the actions of defense counsel to Zarate personally. 4T at 55:22-25 ("Cunning. You get your statement in evidence with no opportunity for anyone to cross-examine you on the statement. Certainly that bears upon *Miller* factor four."); *Id.* at 56:11-14 ("He got that version in evidence with the State's consent without testifying. Bright. Cunning. Relates to *Miller* factor four, capacity to assist his own attorneys.").

Finally, regarding the fifth *Miller* factor, the possibility of rehabilitation, *Miller*, 567 U.S. at 478, the court stated, "I'll make it clear, permanent incorrigibility is not my finding." 4T at 44:24-25. Yet the court then went on to ignore the impact of this

[4]The court also noted its "observations with respect to the defendant's brother during his case," from which the court "assess[ed] some maturity," in contrast with Zarate. 4T at 48:17-20. To the extent the court considered this out-of-court evidence in Zarate's case, this was error. *See Bruton v. United States,* 391 U.S. 123 (1968) (admission of evidence from non-testifying co-defendant, not independently admissible in defendant's case, violates Confrontation Clause). In any event, the observation that Zarate's brother was more mature than Zarate is exactly the point, and should weigh in Zarate's favor, rather than (somehow) against him, under the third factor.

very finding, stating "rehabilitation is difficult for me to assess . . . . [b]ecause according to the defendant, he didn't do anything related to the slaying[.]" *Id.* at 73:3-6. Whether Zarate is *yet* sufficiently mature to concede a role in the slaying and show remorse, however, is distinct from whether he is capable of such rehabilitation in the future. Indeed, "[l]ack of demonstrated remorse is yet another feature of a child's immaturity." *People v. Eliason*, 833 N.W.2d 357, 384 n.6 (Mich. Ct. App. 2013) (Gleicher, P.J., concurring in part and dissenting in part). Because, having itself found that Zarate is not incorrigible, the failure to assign any mitigating weight to factor five – the possibility of rehabilitation – is inconsistent and nonsensical. Taken alone or with the sentencing court's treatment of the other factors at issue, it requires reversal.

Ultimately then, the court selected a term of 50 years subject to NERA without giving meaningful consideration or weight to any *Miller* factor. Instead, the record reflects, the court selected 50 years as the maximum allowable under law. Thus, at resentencing, the State lamented that the court was legally prohibited from reimposing a life sentence,[5] given the prior finding that Zarate is amenable to reform:

[5]The court had made clear that, but for constitutional limitations, it would have imposed a life sentence, however impermissible: at initial sentencing, the court imposed a sentence of life (subject to NERA) plus 13 years, and at the first resentencing, purportedly

> The problem we have in this case . . . is that . . . a sentence of life . . . is estopped based upon the problem of and a reality of a court of competent jurisdiction has said that the defendant had shown some potential for rehabilitation. So therefore *Miller* and *Montgomery* truncate the finish line of this race in the State's position.
>
> [4T at 24:12-22.]

See id. at 16:10-13 ("[T]he constraints of *Zuber* . . . estop[] the State from requesting Your Honor to impose a life sentence once again."); *id.* at 18:12-15 ("[W]hether he individually deserves it, which clearly the State would submit he does not . . . [,] [*Zarate* is] entitled to a reduction based upon how a sentence has to now be imposed."). The State proposed instead "that a fifty-year sentence with the No Early Release Act would satisfy any constitutional concerns . . . with the recognition that none of us likes it." *Id.* at 30:4-9.

The court agreed with and adopted this approach. Immediately before imposing sentence, the court stated:

> I note from the *Zuber* case that although the court didn't say you can't go fifty-five, because from everything I said they can -- said you can go more than fifty-five years. But I don't know if the Supreme Court was saying fifty-five years is not appropriate under *Miller*.
>
> [*Id.* at 83:14-20.][6]

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applying *Miller*, the court reimposed the life sentence. *Zarate*, 2020 WL 2179126, at *3-4.

[6]The court's observations regarding a term of 55 years were in apparent reference to the lesser period of parole ineligibility as between the two *Zuber* defendants, which was 55 years. *Zuber*, 227 N.J. at 428.

Having thus opined that a term of 55 years was constitutionally suspect, the court simply accepted the State's suggestion and imposed a 50-year term, 42.5 years of which are parole-ineligible. In doing so, the record is clear, the court worked backwards in attempt to circumvent *Zuber* rather than determining an appropriate sentence under the *Miller* factors, as *Zuber* requires.

D. The Appellate Division erred in upholding the trial court's application of the *Miller* factors.

The Appellate Division agreed that "the judge's discussion of the *Miller* factors may not have been as precise or thorough as it could be," *Zarate*, 2020 WL 2179126, at *18, adding that "arguments by appellant and the ACLU [that the court's application of *Miller* was improper] have some probative force," *id.* at *17. Nonetheless, the Appellate Division upheld the trial court's application of the *Miller* factors because "the judge [] scale[d] back even further the sentence he had previously imposed," and because the reviewing court felt compelled to apply a "prism of substantial deference." *Id.* at *17-18. Neither rationale supports affirmance.

First, that Zarate's second resentencing resulted in a lower term of years does not mean that the trial court properly applied the *Miller* factors in computing the sentence — a distinct requirement under *Zuber*. Indeed, the Appellate Division's discussion of the way in which the sentencing court applied the *Miller* factors differs little, if at all, from the description

above, revealing the same reliance on irrelevant considerations and failure to consider compelling evidence. *See*, *e.g.*, *Zarate*, 2020 WL 2179126, at 15 (court assigned no weight under first factor in light of "Zarate's intelligence, lack of psychological disorder or illness"); *id.* (under factor four, "[t]he court attributed to Zarate [legal] decisions" and "found [they] showed Zarate was 'bright' and 'cunning'"); *id.* (court "offset [fifth factor] to an extent [citing] Zarate's failure to admit his participation in the murder and [] his lack of remorse"). By nonetheless affirming, the Appellate Division effectively held, in obvious circumvention of *Zuber*, that courts need not apply the *Miller* factors so long as they discount the sentence they would otherwise apply.

Second, "the deferential standard of review applies only if the trial judge follows the Code and the basic precepts that channel sentencing discretion." *State v. Case*, 220 N.J. 49, 65 (2014). Thus, this Court has "always require[d] that the factfinder apply correct legal principles in exercising its discretion," *State v Roth*, 95 N.J. 334, 363 (1984); no deference is due where the trial court instead misinterprets the law. *See State v. Bolvito*, 217 N.J. 221, 228 (2014) ("We apply a deferential standard of review to the sentencing court's determination, but not to the interpretation of a law."); *State v. Hudson*, 209 N.J. 513, 529 (2012) ("Generally, the abuse-of-discretion standard of review applies in appellate sentencing review, but questions of law are

reviewed *de novo*.") (citations omitted); *State v. Galicia*, 210 N.J. 364, 381 (2012) ("We consider legal and constitutional questions *de novo*."). Accordingly, the trial court's misinterpretation of *Zuber* – working backwards by discounting the sentence previously imposed, rather than applying the *Miller* factors to determine a fair and proportionate sentence – was legal error to which no deference was appropriate.

But even under an abuse-of-discretion standard, the Appellate Division was overly deferential to the trial court's sentencing decision. Review for abuse of discretion requires a determination of "whether there is substantial evidence in the record to support the findings of fact," *Roth*, 95 N.J. at 387, and "appellate courts are expected to exercise a vigorous and close review for abuses of discretion by the trial courts," *State v. Jarbath*, 14 N.J. 394, 400-01 (1989). Here, the Appellate Division's own discussion made plain that there was *not* substantial evidence in the record to support the trial court's findings under the *Miller* factors - rather, the record evidence contradicted those findings, as previously discussed. The Appellate Division's exercise of deference was thus a failure to conduct the requisite "vigorous and close review." For these reasons, the Appellate Division erred by upholding the trial court's application of the *Miller* factors in its sentencing, and this Court should reverse, vacate, and

remand for an appropriate resentencing that gives meaningful consideration and weight to the *Miller* factors.

II. This Court Should Hold Under Article 1, Paragraph 12 That Every Juvenile Must Receive An Opportunity to Demonstrate Maturity and Rehabilitation After 15 Years Of Incarceration.

In *Zuber*, after holding that the constitutional proscriptions against life without parole apply, as well, to lengthy sentences, including ones that are "the practical equivalent of life without parole," 227 N.J. at 429, and that "judges must evaluate the *Miller* factors when they sentence a juvenile to a lengthy period of parole ineligibility for a single offense" and "when they consider a lengthy period of parole ineligibility in a case that involves multiple offenses at different times," *id.* at 447, the Court deferred to the Legislature the enactment of "a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility" in order "[t]o avoid a potential constitutional challenge in the future," *id.* at 452. The Legislature has failed to respond to that request by enacting applicable legislation, and Zarate now presents the "constitutional challenge" that *Zuber* foresaw. As a result, it now falls to the Court to determine if and when juveniles sentenced to lengthy periods of parole ineligibility are entitled to the review of their sentences as a matter of New Jersey constitutional law.

In resolving this issue, *amicus* proposes that the Court should first hold, consistent with the principles undergirding *Zuber* and

the United States Supreme Court jurisprudence from which it derived, that juveniles sentenced to lengthy periods of parole ineligibility are entitled to later review of their sentences in order to assess "whether [they] still fail[] to appreciate risks and consequences, or whether [they] may be, or ha[ve] been, rehabilitated." *Zuber*, 227 N.J. at 452. Then, employing constitutional proportionality analysis to determine the point by which juveniles must receive that opportunity, the Court should be guided by an extensive body of empirical research establishing an "age-crime" curve. This statistical data and analysis establishes that most juvenile offenders age out of criminal activity within 15 years, and that the few who are likely to pose a continuing danger can likely be identified at that time by their persistent antisocial behavior. In this manner, established social science – of exactly the kind that has given rise to the juvenile sentencing jurisprudence at the heart of this case – provides a sound and principled basis on which to draw a constitutional line: the Court should accordingly require that all juveniles receive an opportunity to demonstrate maturity and rehabilitation after no more than 15 years.[7]

[7]Though this issue was squarely presented below, the Appellate Division engaged in no analysis of it whatsoever, "declin[ing] to foreclose, as the Court suggested in *Zuber*, the possibility that Zarate may in the future be able to 'return to court' and demonstrate that he has sufficiently reformed himself," while also "not decid[ing] what would be an appropriate amount of time in

A. Juveniles sentenced to lengthy periods of parole ineligibility must be afforded later review of their sentences.

Zuber recognized that even when a sentencing court properly applies the *Miller* factors, a sentence carrying a "lengthy period of parole ineligibility" might later prove unconstitutional if the juvenile is able to demonstrate rehabilitation years before any opportunity for release. 227 N.J. at 451-52 (stating that hypothetical juvenile who served years in prison and yet remained ineligible for parole or release and "ask[ed] the court to review factors that could not be fully assessed when he was originally sentenced—like whether he still fails to appreciate risks and consequences, or whether he may be, or has been, rehabilitated" would "raise serious constitutional issues"). That issue is now squarely raised, and given the opportunity presented by this case, the Court should hold that under Article 1, paragraph 12 of the New Jersey Constitution, "sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date." *Id.* at 452.

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prison to elapse to justify such motions," neither "endors[ing] [n]or reject[ing]" the arguments of the parties and *amici*. *Zarate*, 2020 WL 2179126, at *19. Accordingly, there is no pertinent decision on this issue for this Court to review, and thus no discussion of the decision of the Appellate Division in what follows.

This conclusion follows from three well-established premises: first, that a sentence of life without parole is constitutional only for juvenile homicide offenders who are incorrigible; second, that a sentence of life without parole is constitutionally indistinguishable from one carrying a lengthy period of parole ineligibility; and third, that whether a juvenile is incorrigible cannot be determined at initial sentencing but only later, when the defendant has been through adolescence and had the opportunity to mature. Thus, later review of a juvenile's sentence is necessary to determine whether he is, in fact, incorrigible such that a lengthy period of parole ineligibility is truly justified.

First, the law is absolutely clear that only those juvenile homicide offenders who are incorrigible may be sentenced to life imprisonment without parole. That is because the signature qualities of youth undermine the penological justifications – including retribution and deterrence – for so harsh a punishment. "'[T]he case for retribution is not as strong with a minor as with an adult'" because juveniles' immaturity and impetuosity make them less culpable for their crimes, and "'personal culpability'" is at "'[t]he heart of the retribution rationale.'" *Graham*, 560 U.S. at 71 (citations omitted). And the "'same characteristics'" make juveniles "'less susceptible to deterrence,'" as their propensity for "'impetuous and ill-considered actions and decisions'" means that "they are less likely to take a possible punishment into

consideration when making decisions." *Id.* at 72 (citations omitted).

This leaves only the incapacitation and rehabilitation rationales. But incapacitation can "justify life without parole . . . [only if] the juvenile offender forever will be a danger to society," *i.e.*, only if "the sentencer [] make[s] a judgment that the juvenile is incorrigible." *Id.* at 72. And because life without parole "forswears altogether the rehabilitative ideal," that penalty is, likewise, compatible with the rehabilitation rationale only for a juvenile who is incorrigible. *Id.* at 74. Thus, life without parole is proportional only for incorrigible juveniles convicted of homicide. *See Zuber*, 227 N.J. at 451 (noting "it is only the 'rare juvenile offender whose crime reflects irreparable corruption'" who may be sentenced to life without parole for homicide) (citation omitted); *see also Montgomery*, 577 U.S. at 208 ("[*Miller*] rendered life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth.").[8] All other juveniles are entitled

[8] *Jones* endorsed this limitation, quoting the "key paragraph from *Montgomery*" with approval:

> "That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment."

to "'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'" *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75).

Second, in *Zuber*, this Court made clear that the constitutional limits on sentencing juveniles to life without parole apply equally to juveniles sentenced to "lengthy periods of parole ineligibility." 227 N.J. at 450. Specifically, *Zuber* held that "it does not matter for purposes of the Federal or State Constitution" whether a juvenile is sentenced to life without parole or its functional equivalent, or even to a term with "a lengthy period of parole ineligibility," because the consequences to the juvenile are sufficiently similar to "implicate[] the principles of *Graham* and *Miller*." *Id.* at 446-48 (noting, "we decline to elevate form over substance."). Thus, because life without parole is justifiable only for incorrigible juveniles

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> [141 S.Ct. at 1315 n.2 (quoting *Montgomery*, 577 U.S. at 211).]

See also id. at 1317-18 ("*Miller* required . . . '[a] hearing . . . to separate those juveniles who may be sentenced to life without parole from those who may not.'") (quoting *Montgomery*, 577 U.S. at 210). Indeed, *Jones* was explicit that, "[t]oday's decision does not overrule *Miller* or *Montgomery*." *Id.* at 1321. *Jones* simply held that, under the Federal Constitution, there is no "magic-words requirement," and therefore that a determination of incorrigibility need be neither explicit nor implicit in the record. *Id.* As noted, however, New Jersey law diverges in this respect, requiring a detailed explanation on the record of all discretionary decisions impacting the sentence imposed.

convicted of homicide, so too are sentences carrying lengthy periods of parole ineligibility.

Third, incorrigibility cannot be determined at the time of a juvenile's initial sentencing. As the Supreme Court has repeatedly noted, at the time of sentencing, "it 'is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Jones*, 141 S.Ct. at 1315 (quoting *Roper*, 543 U.S. at 573). Indeed, *Graham* prohibited life without parole for juveniles convicted of non-homicide specifically on this basis. 560 U.S. at 75 ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset."). And while *Miller* did not prohibit that determination in the case of juvenile homicide offenders,[9] on this point, *Zuber* – interpreting the New Jersey Constitution – adopted the reasoning of *Graham*, not *Miller*. Thus, *Zuber* cited *Graham* for

[9]*Miller* did not, however, contradict the logic of *Graham* that "[t]he characteristics of juveniles make [] judgment[s] [of incorrigibility] questionable." *Graham*, 560 U.S. at 73. To the contrary, *Miller* emphasized the "great difficulty" of making such determinations at the time of sentencing. 567 U.S. at 479 (pointing up this difficult as a further reason why sentences of life without parole for juveniles convicted of homicide should be "uncommon"). *Miller* simply left the door open in view of the unique gravity of homicide. *Id.* at 480.

the proposition that States are prohibited "'from making the judgment *at the outset* that [a juvenile] never will be fit to reenter society.'" *Zuber*, 227 N.J. at 451 (citing *Graham*, 560 U.S. at 75) (emphasis and modifications in *Zuber*). And, as noted, *Zuber* made clear that, regardless of the offense, it "would raise serious constitutional issues" if a juvenile sentenced to a lengthy term could not later seek review of "factors that could not be fully assessed when he was originally sentenced — like whether he still fails to appreciate risks and consequences, or whether he may be, or has been, rehabilitated." *Id.* at 452. In sum, in New Jersey, a juvenile may not be determined to be incorrigible at initial sentencing consistent with Article 1, paragraph 12.

Zuber's holding on this point is, of course, amply supported by the scientific literature. Thus, extensive research shows that several of the core diagnostic items for psychopathy – those that are most often used to predict future dangerousness – overlap with inherent and transitory features of youth. *See* Daniel Seagrave & Thomas Grisso, "Adolescent Development and the Measurement of Juvenile Psychopathy," 26 L. & Human Behavior 219, 224 (2002) (citing "many ways in which operational definitions of psychopathy have parallels in characteristics of children and adolescents"); John F. Edens, *et al.*, "Assessment of 'Juvenile Psychopathy' and Its Association with Violence: A Critical Review," 19 Behavioral Sci. & L. 53, 58 (2001) (psychopathy diagnostics of "need for

stimulation/proneness to boredom, impulsivity, and poor behavioral controls" are problematic in assessing juveniles because "sensation and thrill seeking . . . increase from mid to late adolescence . . . , and then decline over the course of adulthood"). Consequently, empirical data confirms, such assessments confuse normal features of adolescent development with a probability of future dangerousness, resulting in many more false positives than accurate predictions. *See* Elizabeth Cauffman, *et al.*, "Comparing the Stability of Psychopathy Scores in Adolescents Versus Adults: How Often Is "Fledgling Psychopathy" Misdiagnosed?," 22 Psych., Public Pol'y, & L. 77, 84 (2016) (diagnoses of psychopathy in adolescence are not stable over even short periods of time); Richard Rogers, *et al.*, "Predictors of adolescent psychopathy: Oppositional and conduct-disordered symptoms," 25 J. Am. Acad. Psych. & L. 261, 269 (1997) (empirical study finding weak correlation between diagnosis of psychopathy in adolescence and later physical aggression); *see also* John F. Edens, *et al.*, "Youth Psychopathy and Criminal Recidivism: A Meta-Analysis of the Psychopathy Checklist Measures," 31 L. & Human Behavior 53, 59 (2006) (meta-analysis with sample size of nearly 3,000 individuals finding weak correlation between youth psychopathy diagnosis and violent recidivism); *see also* John F. Edens & Justin S. Campbell, "Identifying Youths at Risk for Institutional Misconduct: A Meta-Analytic Investigation of the

Psychopathy Checklist Measures," 4 Psychological Servs. 13, 23 (2007) (empirical study examining behavior of juveniles diagnosed with psychopathy in institutional settings "revealed that physical violence occurred too infrequently to examine"). In short, *Graham* and *Zuber* were correct in holding that it is not possible to determine "'*at the outset*'" whether a juvenile will forever pose a danger to society. *Zuber*, 227 N.J. at 451 (quoting *Graham*, 560 U.S. at 75).

Taken together, these three premises – that only an incorrigible juvenile convicted of homicide may be sentenced to a term of life without the possibility of parole; that imposition of a "lengthy period of parole ineligibility" on a juvenile is subject to the same constitutional constraints as a sentence of life without parole under Article 1, paragraph 12 of the New Jersey Constitution; and that Article 1, paragraph 12 forbids sentencing courts from making a determination of incorrigibility in the case of a juvenile at the time of initial sentencing – compel the conclusion that juveniles sentenced to lengthy periods of parole ineligibility must be provided an opportunity for later review of their sentences. Under *Zuber*, such sentences are justifiable only for individuals who are incapable of reform, and that determination cannot be made at initial sentencing when a juvenile will not yet have outgrown the hallmark features of youth. As a result, to ensure that a juvenile sentence carrying a lengthy period of parole

ineligibility complies with the constitutional mandate of Article 1, paragraph 12, those who receive such sentences must have a subsequent opportunity to demonstrate that they are not incorrigible, but rather capable of reform.

B. Juveniles should receive an opportunity to demonstrate maturation and reform after no more than 15 years.

Identifying when after initial sentencing a juvenile must be provided a chance to prove that he has been rehabilitated is a matter that implicates constitutional proportionality review. Under this paradigm, the most pertinent question is the pragmatic one of when, during a juvenile's incarceration, it is possible to distinguish the juvenile who is capable of reform from the one who is not. Research regarding the age-crime curve provides an answer to this question: within 15 years, almost all juveniles will desist from criminal activity, and the few who are likely to persist in criminality can be readily identified at that time. Accordingly, and in the absence of legislative action, the time has now come for the Court to recognize a constitutional requirement that all juveniles receive "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" after 15 years. *Graham*, 560 U.S. at 75.

To begin, the analytical tool for determining whether a sentence is disproportionate for a category of offenders is well-established: both this Court and the United States Supreme Court

employ constitutional proportionality review. *See Graham*, 560 U.S. at 61-75 (explaining and applying proportionality review); *Zuber*, 227 N.J. at 438 ('"The test to determine whether a punishment is cruel and unusual ... is generally the same' under both the Federal and State Constitutions.") (citation omitted).[10] This analysis entails two parts – review of "objective indicia of society's standards, as expressed in legislative enactments and state practice," *Roper*, 543 U.S. at 572, and "exercise of [the Court's] own independent judgment," relying on scientific and social science research concerning the culpability of the class of offenders, the severity of the punishment, and the extent to which the traditional penological rationales support the punishment for the offenders in question, *Graham*, 560 U.S. at 61, 67-68. These two components are distinct; "[i]f the punishment fails any one of [these] tests, it is invalid." *Gerald*, 113 N.J. at 78 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Under the first part, which addresses objective indicia of societal values, as *Zuber* recognized, 227 N.J. at 452 n.4, State legislative enactments show a clear trend in favor of providing all juveniles an opportunity to demonstrate maturity and rehabilitation after some determinate term of years. *See Atkins v.*

[10]As previously discussed, the Court can and has recognized broader protection under Article 1, paragraph 12 than the Eighth Amendment. *See Zuber*, 227 N.J. at 438 (citing *Gerald*, 113 N.J. at 76).

Virginia, 536 U.S. 304, 312, 315 (2002) (noting "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" particularly "the consistency of the direction of change.") (citation omitted). But while State legislative enactments generally concur that this opportunity must be afforded within 30 years,[11] there is no apparent consensus as to where to draw the line precisely – of the 11 States

[11]Eleven (11) States draw the line somewhere within 30 years. *See* Cal. Penal Code § 3051(b) (2016) (maximum permissible juvenile term without parole eligibility is 25 years); Ken. Rev. Stat. 640.040 (1987) (same); Wyo. Stat. Ann. § 6-10-301(c) (2016) (same); Va. H.B. 35, Gen. Assemb. (Reg. Sess. 2020) (20 years); Or. S.B. 1008, 80th Leg. Assemb. (Reg. Sess. 2019) (15 years); W. Va. Code § 61-11-23(b) (2016) (same); Fla. Stat. § 921.1402 (2016) (juvenile offender may petition for parole or reduction of sentence after serving, at most, 25-year term); D.C. B21-0683, D.C. Act 21-568 (2016) (same, after 20 years); N.D. H.B. 1195, 65th Leg. Assemb. (2017) (same); Wash. Rev. Code § 9.94A.730(1) (2016) (same); *see also* Mont. Code Ann. § 46-18-222(1) (2016) (prohibiting all mandatory minimum sentences and periods of parole ineligibility in the case of juveniles).

Five (5) more States draw the line at 30 years. *See* Ark. S.B. 294, 91st Gen. Assemb. (Reg. Sess. 2017) (maximum period of parole ineligibility is 30 years, reserved for juveniles convicted of capital murder); Conn. S.B. 796, Jan. Sess. (2015) (all juveniles eligible for parole after maximum of 30 years); Del. S.B. 9, 147th Gen. Assemb., Reg. Sess. (2013) (juveniles may petition for sentence modification after, at most, 30 years); Mass. H. 4307, 188th Gen. Court (2014) (maximum period of parole ineligibility set at 30 years for juveniles convicted of particularly aggravated homicides); OH S.B. 256, 133rd Gen. Assemb. (2020) (same).

Two (2) states draw the line at 40 years. *See* Colo. S.B. 16-181,70th Gen. Assemb., 2d Reg. Sess. (2016) (maximum period of parole ineligibility for juveniles convicted of aggravated murders is 40 years); Tex. S.B. 2, 83rd Leg. Special Sess. (2013) (same).

that draw the line within 30 years, four set the mark at 25 years, four at 20, and two at 15, while Montana forbids all mandatory minimums and periods of parole ineligibility for juveniles. *See supra* n.10. Thus, objective indicia show that society favors giving juveniles a chance to earn their release within 30 years but offers no more specific guidance.

As a result, the Court must exercise its own judgment, examining the nature of the offenders, the punishment, and the applicability of established penological rationales – much of which is already settled law. That is, as previously discussed, *see supra* at 13, the recent juvenile sentencing jurisprudence establishes that juveniles are categorically different from adults in ways that diminish their culpability. *See Roper*, 543 U.S. at 569-70. The Supreme Court's precedents also make clear that these differences alter the traditional penological calculus, rendering the retribution and deterrence rationales insufficient to justify sentences that frustrate a "chance for fulfillment outside prison walls" or "reconciliation with society." *Graham*, 560 U.S. at 71-72, 79.

As a result, the seminal question for purposes of proportionality review in this context is what length of sentence can be justified under the incapacitation and rehabilitation rationales for the juvenile who is, as the Defendant has been found to be here, capable of reform. And necessarily, the answer to that

question is: only so long as is necessary for the juvenile to achieve and demonstrate his rehabilitation. In other words, the law is now clear that once a juvenile can demonstrate rehabilitation, neither of the predominant penological rationales justify further punishment, making continued incarceration disproportionate. *Zuber* recognized as much in stating that it would raise "serious constitutional issues" if a juvenile were incarcerated beyond the time necessary for him to prove that he "may be, or has been, rehabilitated." 227 N.J. at 452; *see also id.* at 446 (summarizing "the essence" of *Montgomery* to be that "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored").

Here, research establishing the age-crime curve provides a more specific answer to the "how long" inquiry.[12] Thus, researchers

[12]The United States and New Jersey Supreme Courts have consistently relied upon just this kind of social science research and literature in performing proportionality review. *See, e.g.*, *Miller*, 567 U.S. at 471, 472 n.5 (quoting *Roper*, 543 U.S. at 569, in citing psychiatric and neurological studies of adolescent development, and noting, "science and social science . . . have become even stronger"); *Graham*, 560 U.S. at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *accord Zuber*, 227 N.J. at 439; *see also Atkins v. Virginia*, 536 U.S. 304, 317-18 (2002) (citing social science literature in finding individuals with intellectual disability insufficiently culpable for the death penalty); *see also State v. Ramseur*, 106 N.J. 123, 180 n.14 (1987) (citing social science research in determining that "the

studying the breakdown of criminal activity by age — specifically, by plotting age on the x-axis against the aggregate number of offenses on the y-axis — consistently observe an inverted U-shaped "age-crime curve," revealing that:

> [V]ery large percentages of young people commit offenses; rates peak in the mid-teenage years for property offenses and the late teenage years for violent offenses followed by rapid declines. For most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s.
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> [Michael Tonry, "Sentencing in America: 1975-2025," 42 Crime & Justice 141, 182 (2013).]

And this pattern has been observed in countless empirical studies as documented by numerous sources. *See*, *e.g.*, Terrie E. Moffitt, "Adolescence-Limited and Life Course-Persistent Antisocial Behavior: A Developmental Taxonomy," 100 Psych. R. 674, 675 (1993) ("When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood.");[13] *accord* U.S. Dep't of Justice, Nat'l Inst. of Justice, Report, "From Juvenile

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Legislature could reasonably find that the death penalty deters murder").

[13]Citing, among others, Alfred Blumstein & Jacqueline Cohen, "Characterizing Criminal Careers," 237 Science 985, 986 (1987) (examining data set from over 40 years of Uniform Crime Reports, an annual publication of "monthly reports submitted to the [Federal Bureau of Investigation] by individual police departments of the numbers of crimes reported to the police and the numbers of arrests[.]").

Delinquency to Young Adult Offending" (2014);[14] *accord* Alfred Blumstein & Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," 47 Criminology 327, 331 (2009).[15]

Significantly, this pattern holds for "[i]nvolvement in violent and nonviolent crime.'" Laurence Steinberg, "The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability," 14 Neuroscience 513, 515 (2013). Thus, a United States Department of Justice study found that between 1990 and 2010, arrest rates for murder, rape, robbery, and aggravated assault all revealed an age-crime curve with participation in violent conduct peaking in late adolescence (age 19 for murder, rape, and robbery) and declining precipitously thereafter. Howard N. Snyder, "Arrest in the United States, 1990-2010," Report, U.S. Dep't of Justice, Bureau of Justice Statistics 3-6 (2012).[16] Indeed, for offenses of all types, all the major studies of the

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[14]*Available at* http://www.nij.gov/topics/crime/Pages/delinquency-to-adultoffending.aspx#noteReferrer2 (citing, among others, David P. Farrington, "Age and Crime," 7 Crime & Justice 189 (1986) (longitudinal study of over 400 males utilizing research and public records); Alex R. Piquero, *et al.*, *Key Issues in Criminal Career Research: New Analyses of the Cambridge Study in Delinquent Development* (2007) (analyzing same data set)).

[15]Citing, among others, Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life* (1993) (examining data compiled through the "Gluecks' Study," a longitudinal study, based on interviews and public records, of 500 delinquent boys matched with 500 nondelinquents across numerous metrics).

[16]*Available at* https://bjs.gov/content/pub/pdf/aus9010.pdf.

last century have replicated the same U-shaped-curve finding. *See* Alex R. Piquero, *et al.*, "The Criminal Career Paradigm," 30 Crime & Justice 359, 365-77 (2003).[17]

The age-crime curve thus establishes that crime "tends to be a young person's activity." Jeffery T. Ulmer & Darrell Steffensmeier, "The Age and Crime Relationship: Social Variation, Social Explanations, The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality," at 393-94 (Kevin M. Beaver, *et al.*, eds. 2015). Indeed, "[a]ctual rates of illegal behavior soar so high during adolescence that participation in delinquency appears to be a normal part of teen life." Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 PSYCH. R. at 675 (internal citation omitted). But this research also shows that individuals overwhelmingly outgrow criminal

[17]This meta-analyses discusses, in addition to the studies previously noted: the Cambridge-Somerville Project (experiment with 650 subjects grouped in pairs to test effects of early intervention on delinquency, with longitudinal follow-up); the Philadelphia Birth Cohort Study (utilizing public records to follow the criminal careers of individuals drawn from a sample of 9,945 boys born in Philadelphia aged 10-17); the National Youth Survey (longitudinal interview project of 1,725 male youths of starting ages between 11 and 17); the Montreal Sample of Adjudicated Youths (longitudinal interview project for 470 male youths recruited from juvenile court proceedings); the Causes and Correlates Studies (United States Department of Justice study coordinating longitudinal research of 1,517 high-risk boys in Pittsburgh, Pennsylvania, 1,000 youths in Rochester, New York, and 1,527 youths in Denver, Colorado); and the Project on Human Development in Chicago Neighborhoods (longitudinal study of 6,500 children and adolescents).

behavior as they mature.[18] And critically, the literature reveals as a statistical matter, using extensive data across places, eras, and cultures, *when* juveniles age out of crime.

In particular, research demonstrates that a sizeable portion of all offenders, including juveniles, are "immediate desisters," *i.e.* individuals whose first offense is also their last. *See* Megan C. Kurlycheck, *et al.*, "Long-Term Crime Desistance and Recidivism Patterns – Evidence from the Essex County Felony Study," 50 Criminology 71, 98 (2012) (citing longitudinal studies showing that between approximately one quarter to one half of offenders desist after their first offense); *see also* Maynard L. Erickson, "Delinquency in a Birth Cohort: A New Direction in Criminological Research," 64 J. Crim. L. & Criminology 362, 364 (1973) (empirical study of 9,945 juvenile delinquents finding that "46 percent were classified as one-time offenders") (citing Marvin E. Wolfgang, *et al.*, *Delinquency in a Birth Cohort* (1972)). And of those juveniles

[18]The empirical findings on this point are in accord with the neuroscience and psychiatric research, showing that most juveniles leave behind criminality when their brains and social/emotional development reach maturity in the mid-to-late 20's. *See*, *e.g.*, Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," 28 Development Rev. 78, 97 (2008) (discussing neuroscience evidencing that regions of the brain responsible for executive function and emotional regulation are in the process of development through the mid-20's and beyond); Laurence Steinberg & Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," 58 Am. Psych. 1009, 1012 (2003) (discussing behavioral studies showing that impulse control develops continuously up through the mid 20's).

who do not desist immediately, the vast majority do so within a few years of adolescence, such that by their mid-to-late 20's, only a small minority of juvenile offenders (10-15%) continue to engage in criminal behavior. *See* Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 680 (estimating desistance by mid-to-late 20's at 85%); Steinberg, "The Influence of Neuroscience," 14 Neuroscience at 516 (estimating same at 90%). As a result, within 15 years – *i.e.*, for a juvenile who (like the defendant here) might have been 14 at the time of the offense at youngest, by the late 20's – even juveniles convicted of serious offenses overwhelmingly age out of crime.[19]

Conversely, the evidence suggests that the minority who persist in criminal activity up to the 15-year-marker may continue to do so indefinitely:

> A substantial body of longitudinal research consistently points to a very small group of males who display high rates of antisocial behavior across time and in diverse situations. The

[19]The same conclusion is evident from related research into average criminal career lengths. From first to last offense, regardless of the type of crime, the average criminal career is between 5 and 15 years. *See* Alex R. Piquero, *et al.*, "The Criminal Career Paradigm," 30 Crime & Justice 359, 435 (2003). (internal citations omitted) ("Three major studies in the 1970s estimated career lengths to be between five and fifteen years."); *see also* Alfred Blumstein, *et al.*, *The Duration of Adult Criminal Careers* 10 (1982) ("The most methodically sophisticated attempt to estimate career lengths . . . . suggest that adult criminal careers for index offenses other than larceny follow an exponential distribution between ages 18 and 40 with a mean total length between 8 and 12 years.") (internal citations omitted).

> professional nomenclature may change, but the faces remain the same as they drift through successive systems aimed at curbing their deviance: schools, juvenile-justice programs, psychiatric treatment centers, and prisons.
>
> [Moffitt, "Adolescence-Limited and Life-Course-Persistent," 100 Psych. R. at 678.]

In other words, the juveniles who are incapable of rehabilitation will show themselves through a continuing pattern of misconduct up to and beyond the point at which their peers have desisted. Practically speaking, this means that the key evidence that a juvenile's offense conduct was *not* a product of transient immaturity will be reflected in institutional records, showing disciplinary infractions "across time and in diverse situations," regardless of the individual's age or developmental maturity. *Id.* Accordingly, the age-crime curve research suggests a demarcation at 15 years as the point by which it will be possible to separate the majority of juveniles, who are capable of reform, from the small minority who most likely are not.

It must be noted, of course, that while 15 years is an evidence-backed signpost for juveniles as a class, the research does not suggest that it will always be certain, in individual cases, that a particular juvenile can be safely released at the 15-year-marker. For example, a juvenile's institutional history might show a pattern of early prison infractions followed by a short term of years without incident, suggesting that the juvenile

is on the path to reform but not yet ready for release. Alternatively, an individual might present a steady pattern of antisocial conduct up to the 15-year-marker yet ultimately prove capable of rehabilitation.[20] Thus, in reassessing the sentence of a juvenile after 15 years, the fact-finder must have discretion to tailor the result to the particular circumstances. And the fact-finder should exercise caution to ensure both that the public remains safe and that the juvenile is not punished disproportionately – in many instances, this may counsel further reassessment after a relatively short period of time.

Ultimately, however, a term of 15 years represents a statistically appropriate period of time at which to first assess whether a juvenile has been rehabilitated. Since between 85-90% of juveniles will have aged out of criminality by that time, the further incarceration of juveniles without opportunity to demonstrate maturity and reform cannot be justified under either the incapacitation or rehabilitation rationale. As a result, to

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[20]Research shows a final wave of desistance in the early 40's, meaning that those juveniles who persist in criminality up to the 15-year-marker are not necessarily incapable of reform. *See* John H. Laub & Robert J. Sampson, "Understanding Desistance from Crime," 28 Crime & Justice 1, 17 (2001) (of the small group of "persistent offenders" who remain criminally active in their 30's, "[a]fter their early 40s, . . . termination rates are quite high") (internal citation omitted); Andrew Golub, "The Adult Termination Rate of Criminal Careers," Paper, Carnegie Mellon Sch. of Urban and Public Affairs at 6 (1990)[20] (discussing "the over 40 'burn-out' period during which offenders terminate criminal activity at an increasing rate").

ensure the constitutional punishment of juveniles, the Court should take guidance from the age-crime curve research and require that all juveniles receive an opportunity to earn their release through demonstrated rehabilitation after 15 years.

CONCLUSION

For the foregoing reasons, the Court should vacate Zarate's sentence and remand for proper consideration of the *Miller* factors in determining sentence. The Court should further hold that under Article 1, paragraph 12, all juveniles are entitled to an opportunity to demonstrate maturity and rehabilitation to earn their release after no more than 15 years.

Respectfully submitted,

/s/ Lawrence S. Lustberg
Lawrence S. Lustberg, Esq.
Attorney ID No. 023131983
GIBBONS P.C.

Alexander Shalom, Esq.
Attorney ID No. 021162004
Jeanne LoCicero, Esq.
Attorney ID No. 024052000
American Civil Liberties Union of New Jersey

Avram D. Frey, Esq.
Attorney ID No. 188002016

Counsel for Amicus Curiae *the American Civil Liberties Union of New Jersey*

Dated: June 10, 2021

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. James Comer (A-42-20) (084509)
State v. James C. Zarate (A-43-20) (084516)

Argued October 26, 2021 -- Decided January 10, 2022

RABNER, C.J., writing for the Court.

Defendants James Comer and James Zarate ask the Court to find that a mandatory sentence of at least 30 years without parole, which the murder statute requires, is unconstitutional as applied to juveniles.

During the evening of April 17 and the early morning of April 18, 2000, Comer and two others participated in four armed robberies. During the second robbery, an accomplice shot and killed a robbery victim. At the time, Comer was 17 years old. Comer was sentenced in 2004 to an aggregate term of 75 years in prison with 68.25 years of parole ineligibility. In State v. Zuber, 227 N.J. 422, 451-53 (2017), the Court asked the trial court to conduct a new sentencing hearing in Comer's case and to consider the factors set forth in Miller v. Alabama, 567 U.S. 460, 478 (2012).

On remand, the trial court noted that factors were present, including the environment in which Comer grew up, which made "[t]he reality of criminal behavior . . . inescapable," and the fact that Comer had "shown an ability to be rehabilitated." The trial judge nevertheless imposed the mandatory minimum sentence for felony murder -- 30 years in prison without the possibility of parole. N.J.S.A. 2C:11-3(b)(1). The court declined to find the statute unconstitutional as applied to Comer and added that a 30-year period of parole ineligibility was "appropriate in this case." The Appellate Division upheld Comer's sentence, and the Court granted certification. 245 N.J. 484 (2021).

Defendant James Zarate was convicted of participating in a brutal murder with his older brother. At the time of the offense in 2005, Zarate was 14 years old, less than one month shy of his 15th birthday. For the murder conviction, the court sentenced Zarate to life imprisonment, subject to an 85-percent period of parole ineligibility under the No Early Release Act (NERA), with consecutive sentences for two additional offenses. The Appellate Division affirmed but remanded on a discrete issue, and it directed the trial court to address mitigating factor thirteen, N.J.S.A. 2C:44-1(b)(13) -- "The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant" -- which the court did not consider earlier.

On remand, the court rejected mitigating factor thirteen, finding no proof that Zarate had been influenced by his older brother. The court addressed the Miller factors but found they did not favor Zarate, stressing his intelligence, supportive family, participation in his own defense, and prison infractions. The court resentenced Zarate to life in prison subject to NERA for murder but did not impose any consecutive sentences.

On a second appeal, the Appellate Division again reversed and remanded, instructing "the trial court to reconsider its proportionality analysis in light of" the United States Supreme Court's 2016 determination that Miller applies retroactively. The Court granted certification and summarily remanded for resentencing in light of Zuber.

After weighing other statutory factors, the court resentenced Zarate for murder to 50 years in prison. Consistent with NERA, Zarate must serve 85 percent of that term before he is eligible for parole. Zarate appealed, and the Appellate Division modified and affirmed his sentence. The Court granted part of Zarate's petition for certification. 245 N.J. 485 (2021).

HELD: *The statutory framework for sentencing juveniles, if not addressed, will contravene Article I, Paragraph 12 of the State Constitution. To remedy the concerns defendants raise and save the statute from constitutional infirmity, the Court will permit juvenile offenders convicted under the law to petition for a review of their sentence after they have served two decades in prison. At that time, judges will assess a series of factors the United States Supreme Court has set forth in Miller v. Alabama, which are designed to consider the "mitigating qualities of youth." 567 U.S. 460, 476-78 (2012).

*At the hearing, the trial court will assess factors it could not evaluate fully decades before -- namely, whether the juvenile offender still fails to appreciate risks and consequences, and whether he has matured or been rehabilitated. The court may also consider the juvenile offender's behavior in prison since the time of the offense, among other relevant evidence.

*After evaluating all the evidence, the trial court would have discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than 20 years. A juvenile who played a central role in a heinous homicide and then had a history of problematic behavior in prison, and was found to be incorrigible at the time of the later hearing, would be an unlikely candidate for relief. On the other hand, a juvenile who originally acted in response to peer pressure and did not carry out a significant role in the homicide, and who presented proof at the hearing about how he had been rehabilitated and was now fit to reenter society after two decades, could be an appropriate candidate for a lesser sentence and a reduced parole bar.

*In remanding these matters for resentencing, the Court expresses no opinion on the outcome of either hearing.

1. Comer and Zarate both contend their sentences violate the prohibition against cruel and unusual punishment of the Eighth Amendment to the United States Constitution and Article I, Paragraph 12 of the State Constitution. The test under both Constitutions is generally the same: First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective? If the punishment fails under any one of the three inquiries, it is invalid. Although the test is similar under federal and state law, the State Constitution can confer greater protection than the Eighth Amendment affords. (pp. 24-26)

2. Since 2005, the United States Supreme Court has written extensively about juvenile sentencing. (pp. 26-32)

- In Roper v. Simmons, the Court banned capital punishment for juveniles under the Eighth Amendment, focusing on the "consistency of the direction of change" in states' approaches to sentencing juveniles to death, as well as on differences between adults and juveniles -- the "signature qualities of youth" -- which tell us that a juvenile's "irresponsible conduct is not as morally reprehensible as" the behavior of an adult. 543 U.S. 551, 564-73, 578 (2005).
- In Graham v. Florida, the Court barred sentences of life without parole for juveniles convicted of non-homicide offenses, again looking to "actual sentencing practices" and the "nature of juveniles." The Court concluded that none of the traditional goals of sentencing justified a sentence of life without parole, "an especially harsh punishment for a juvenile." 560 U.S. 48, 62-82 (2010).
- Miller v. Alabama extended the ban on life-without-parole sentences for juveniles to homicide offenses. The Court noted that the scientific evidence underlying its earlier rulings had "become even stronger" and that mandatory sentencing schemes "prevent the sentencer from taking" the circumstances of youth into account. The Miller Court listed five factors that should be considered before a juvenile is sentenced to life without parole. 567 U.S. 460, 465-80 (2012).
- The Court has since held that Miller applies retroactively and that, although a separate finding of permanent incorrigibility is not required before a judge can sentence a juvenile to life without parole, states could impose additional sentencing limits in cases in which juveniles are convicted of murder.

3. In State v. Zuber, the New Jersey Supreme Court extended Miller to sentences that are the practical equivalent of life without parole. 227 N.J. at 429, 446-47. The decision relied on the State Constitution and requires judges to evaluate the Miller factors before sentencing juveniles to a lengthy term of parole ineligibility. Id. at 429, 447. Zuber underscored one of Graham's concerns: the inability to determine at the moment of sentencing whether a juvenile might one day be fit to reenter society. Id. at 451. The Court recognized that a claim by a juvenile sentenced to a substantial period of parole

ineligibility "would raise serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date." Id. at 452. The Court "encourage[d] the Legislature to examine [the] issue" "[t]o avoid a potential constitutional challenge." A number of bills relating to the issue have been introduced, but none of them have been enacted. (pp. 32-33)

4. Other states have addressed lengthy mandatory minimum sentences and parole bars for juvenile offenders. Fourteen jurisdictions have statutes that allow juvenile offenders to be considered for release before 30 years have passed. The Court reviews those statutes, ten of which have been enacted since Graham and Miller, as well as provisions adopted in several states that fix longer periods of parole ineligibility for juveniles for very serious offenses. Rulings by two State Supreme Courts ban mandatory minimum sentences for juvenile offenders. (pp. 34-40)

5. In the matters before the Court, both juveniles were sentenced under a statute that required them to serve a minimum of 30 years in prison with no possibility of parole, N.J.S.A. 2C:11-3(b)(1). The Court assesses that scheme under the three-part test to determine if the punishment violates the State Constitution. (p. 40)

- *Whether the punishment conforms with contemporary standards of decency*. Of particular concern here is whether a mandatory minimum period of 30 years in jail under N.J.S.A. 2C:11-3(b) -- with no discretion for a judge to assess the details of the offense or the circumstances of the juvenile -- reflects contemporary standards of decency. The Court discusses the broadly applicable principles derived from Supreme Court cases, which recognize the qualities particular to youth and thus require states to give juveniles a chance to show they are fit to reenter society. The Court also reviews legislative enactments in New Jersey that have set maximum sentencing limits in the Family Part at 20 years for murder and 10 years for felony murder; that have required that youth be considered as a mitigating factor at the time of sentencing; that have raised the minimum age for a juvenile to be waived to adult court; and that have eliminated life-without-parole sentences for juveniles. The Court notes the growing trend in other states to allow juveniles an opportunity for release before they spend three decades in jail, and it considers actual sentencing practices. Those sources and trends all suggest that a 30-year parole bar does not conform to contemporary standards of decency. (pp. 40-45)

- *Whether the punishment is grossly disproportionate to the offense*. Murder is an egregious offense that calls for serious punishment. But recent case law calls on judges to consider mitigating qualities of youth that reflect their diminished culpability. See Miller, 567 U.S. at 477; Zuber, 227 N.J. at 447. Yet neither a sentence of life without parole, as in Miller, nor a 30-year parole bar under the homicide statute leave room for any such analysis. Noting the example of felony murder, which the Legislature has distinguished from murder in the Family Part sentencing statute, the Court explains that the diminished culpability of juvenile

offenders suggests that the severity of a 30-year parole bar for juveniles, in many cases, may be grossly disproportionate to the underlying offense. (pp. 45-46)

- *Whether the punishment goes beyond what is needed to accomplish any legitimate penological objective.* Here too, because of the diminished culpability of juveniles, the traditional penological justifications -- retribution, deterrence, incapacitation, and rehabilitation -- "apply . . . with lesser force than to adults." Roper, 543 U.S. at 571. The Court analyzes in detail each of the four justifications in light of United States Supreme Court holdings and social science and finds that none are served by applying a 30-year mandatory minimum sentence to juveniles. (pp. 47-50)

6. Some juvenile offenders should receive and serve very lengthy sentences because of the nature of the offense and of the offender. By itself, that outcome does not necessarily trigger a constitutional concern provided appropriate limits and safeguards are followed. Instead, the constitutional concern here is twofold: the court's lack of discretion to assess a juvenile's individual circumstances and the details of the offense before imposing a decades-long sentence with no possibility of parole; and the court's inability to review the original sentence later, when relevant information that could not be foreseen might be presented. Against the backdrop of the United States Supreme Court's pronouncements on juvenile offenders and the Court's prior holding in Zuber, the existing statutory scheme runs afoul of Article I, Paragraph 12 of the New Jersey Constitution. To save the statute from infirmity, the Court holds under the State Constitution that juveniles may petition the court to review their sentence after 20 years. Although legislatures enact sentencing statutes, courts must determine whether laws are constitutional, and they can add procedures to statutes that would otherwise be unconstitutional to save them from infirmity. The Court imposes a look-back provision here to preserve the homicide statute because it has no doubt the Legislature would want the law to survive. (pp. 50-53)

7. Juvenile offenders sentenced under the statute may petition for a review of their sentence after having spent 20 years in jail. At the hearing on the petition, judges are to consider the Miller factors -- including factors that could not be fully considered decades earlier, like whether the defendant still fails to appreciate risks and consequences, and whether he has matured or been rehabilitated. A defendant's behavior in prison since the time of the offense would shed light on those questions. Other factors, like the circumstances of the homicide offense, would likely remain unchanged. Both parties may also present additional evidence relevant to sentencing. In particular, the trial court should consider evidence of any rehabilitative efforts since the time a defendant was last sentenced. After evaluating all the evidence, the trial court would have discretion to affirm or reduce a defendant's original base sentence within the statutory range, and to reduce the parole bar below the statutory limit to no less than 20 years. The Court asks trial courts to explain and make a thorough record of their findings to ensure fairness and facilitate review. The Court explains that a number of sources support a 20-year look-back, but that the Legislature has the authority to select a shorter time frame. (pp. 53-56)

8. Defendant Comer is entitled to be resentenced again because he was sentenced in keeping with the homicide statute's mandatory period of imprisonment. After assessing the relevant evidence, the trial court here has the authority to impose a period of parole ineligibility of less than 30 years, but not less than 20 years. The Court recognizes that the trial court weighed the Miller factors and reduced Comer's sentence substantially in 2018; the Court does not express a view on the outcome of the new hearing. (pp. 57-58)

9. Zarate is also entitled to be sentenced anew with an appropriate application of the Miller factors. The first Miller factor invites consideration of the "hallmark features" of youth -- "among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Miller, 567 U.S. at 477. At Zarate's most recent resentencing, the trial court mistakenly substituted "intelligence" for "maturity" in evaluating the factor; in addition, strategic decisions by counsel cannot be attributed to a juvenile or factor into the Miller analysis, absent evidence that the juvenile controlled counsel's choice. Nor should a client's request that counsel file certain motions or make certain objections carry much, if any, weight, even if that privileged information comes to light. The Court finds no error in the trial court's rejection of Zarate's claim that he was a victim of peer pressure. And the judge appropriately considered the serious nature of the offense as well as Zarate's behavior in prison and record of infractions, among other things. The Court does not express a view on the outcome of the resentencing hearing. (pp. 58-61)

Both matters are REVERSED and REMANDED for resentencing.

JUSTICE SOLOMON, concurring in part and dissenting in part, joins the majority's conclusions in Zarate's case that the sentencing court misapplied the first Miller factor and appropriately rejected the peer-pressure argument. Justice Solomon dissents, finding that the majority's imposition of a 20-year look-back period is not permitted by the Constitution -- which confers such authority upon the Legislature -- and is not required to save the homicide statute from constitutional infirmity. Justice Solomon expresses belief that New Jersey's current sentencing scheme fulfils the constitutional mandate set forth in the cases on which the majority relies -- that courts are required to treat juveniles differently and to consider certain factors before sentencing them to life without parole or its functional equivalent. Thus, Justice Solomon states, it is not the Court's prerogative to impose an additional restriction on juvenile sentencing. In Justice Solomon's view, a 30-year parole bar for juveniles tried as adults and convicted of homicide conforms with contemporary standards of decency, is not grossly disproportionate as to homicide offenses, and does not go beyond what is necessary to achieve legitimate penological objectives. Viewing the imposition of a look-back period as a subjective policy decision, Justice Solomon writes that the decision must be left to the Legislature.

JUSTICES LaVECCHIA, ALBIN, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion. JUSTICE SOLOMON filed an opinion concurring in part and dissenting in part, in which JUSTICES PATTERSON and FERNANDEZ-VINA join.

SUPREME COURT OF NEW JERSEY

A-42 September Term 2020

A-43 September Term 2020

084509 and 084516

State of New Jersey,

Plaintiff-Respondent,

v.

James Comer, a/k/a
James B. Comer and
James F. Comer

Defendant-Appellant.

State of New Jersey,

Plaintiff-Respondent,

v.

James C. Zarate, a/k/a
Navajas Zarate,

Defendant-Appellant.

State v. James Comer (A-42-20):
On certification to the Superior Court,
Appellate Division.

State v. James C. Zarate (A-43-20):
On certification to the Superior Court,
Appellate Division.

Argued	Decided
October 26, 2021	January 10, 2022

Lawrence S. Lustberg argued the cause for appellant in State v. Comer (A-42-20) (Gibbons, American Civil Liberties Union of New Jersey Foundation, and Lone Star Justice Alliance, attorneys; Lawrence S. Lustberg, Alexander Shalom, Jeanne LoCicero, and Avram D. Frey, on the briefs).

Frank J. Ducoat, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent in State v. Comer (A-42-20) (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Frank J. Ducoat, of counsel and on the briefs).

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for appellant in State v. Zarate (A-43-20) (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the briefs).

John McNamara, Jr., Chief Assistant Prosecutor, argued the cause for respondent in State v. Zarate (A-43-20) (Robert J. Carroll, Morris County Prosecutor, attorney; John McNamara, Jr. and Jessica Marshall, Assistant Prosecutor, on the briefs).

Joseph J. Russo, Assistant Deputy Public Defender, argued the cause for amicus curiae Public Defender of New Jersey in State v. Comer (A-42-20) (Joseph E. Krakora, Public Defender, attorney; Alicia J. Hubbard, of counsel and on the brief).

Jennifer E. Kmieciak, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey in State v. Comer (A-42-20) (Andrew J. Bruck, Acting Attorney General, attorney; Jennifer E. Kmieciak, of counsel and on the brief, and Lauren Bonfiglio, Deputy Attorney General, on the brief).

Dillon J. McGuire argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey in State v. Comer (A-42-20) (Pashman Stein Walder Hayden, attorneys; CJ Griffin, of counsel and on the brief, and Dillon J. McGuire, on the brief).

Natalie J. Kraner argued the cause for amici curiae Campaign for the Fair Sentencing of Youth, Incarcerated Children's Advocacy Network, New Jersey Parents' Caucus, Transformative Justice Initiative, The Beyond the Blindfold of Justice Project, Formerly Incarcerated Youth, and New Jersey Incarcerated Youth in State v. Comer (A-42-20), and State v. Zarate (A-43-20) (Lowenstein Sandler, and The Rutgers Criminal and Youth Justice Clinic, attorneys; Natalie J. Kraner, Anthony J. Cocuzza, Stephanie Ashley, Laura Cohen, Elana Wilf, and Tyler Dougherty, on the brief).

Carol M. Henderson, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey in State v. Zarate (A-43-20) (Andrew J. Bruck, Acting Attorney General, attorney; Carol M. Henderson, of counsel and on the brief, and Jennifer E. Kmieciak and Lauren Bonfiglio, Deputy Attorneys General, on the brief).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey in State v. Zarate (A-43-20) (Gibbons, American Civil Liberties Union of New Jersey Foundation, and Lone Star Justice Alliance, attorneys; Lawrence S. Lustberg, Alexander Shalom, Jeanne LoCicero, and Avram D. Frey, on the brief).

Rachel E. Simon argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey in State v. Zarate (A-43-20) (Pashman Stein Walder Hayden, attorneys; Aidan P. O'Connor, of counsel and on the brief, and Darcy Baboulis-Gyscek, on the brief).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

This appeal raises challenging questions about the constitutional limits that apply to sentences for juvenile offenders.

The law recognizes what we all know from life experience -- that children are different from adults. Children lack maturity, can be impetuous, are more susceptible to pressure from others, and often fail to appreciate the long-term consequences of their actions. Miller v. Alabama, 567 U.S. 460, 477 (2012). They are also more capable of change than adults. Graham v. Florida, 560 U.S. 48, 68 (2010). Yet we know as well that some juveniles -- who commit very serious crimes and show no signs of maturity or rehabilitation over time -- should serve lengthy periods of incarceration.

The issue before the Court is how to meld those truths in a way that conforms to the Constitution and contemporary standards of decency. In other words, how to impose lengthy sentences on juveniles that are not only just but that also account for a simple reality: we cannot predict, at a juvenile's young age, whether a person can be rehabilitated and when an individual might be fit to reenter society.

The question arises in the context of two juveniles who committed extraordinarily serious crimes for which they received long sentences. In one

case, the juvenile offender, who was convicted of felony murder, will not be released for three decades and cannot be considered for parole throughout that time. In the other appeal, it will be more than four decades before the 14-year-old offender, convicted of purposeful murder, will first be eligible to be considered for parole.

Both juveniles argue that their sentences violate federal and state constitutional provisions that bar cruel and unusual punishment. See U.S. Const. amend. VIII; N.J. Const. art. I, ¶ 12. They ask the Court to find that a mandatory sentence of at least 30 years without parole, which N.J.S.A. 2C:11-3(b)(1) requires, is unconstitutional as applied to juveniles.

We decline to strike that aspect of the homicide statute. But we recognize the serious constitutional issue defendants present under the State Constitution. The Court, in fact, anticipated the question in 2017 and asked the Legislature to consider amending the law to allow juvenile offenders who receive sentences with lengthy periods of parole ineligibility to return to court years later and have their sentences reviewed. State v. Zuber, 227 N.J. 422, 451-53 (2017).

Today, faced with actual challenges that cannot be overlooked, we are obligated to address the constitutional issue the parties present and cannot wait to see whether the Legislature will act, as the State requests. That approach is

consistent with the basic roles of the different branches of government. The Legislature has the responsibility to pass laws that fix the range of punishment for an offense; the Judiciary is responsible to determine whether those statutes are constitutional. Under settled case law, courts also have the authority to act to protect statutes from being invalidated on constitutional grounds.

Here, the statutory framework for sentencing juveniles, if not addressed, will contravene Article I, Paragraph 12 of the State Constitution. To remedy the concerns defendants raise and save the statute from constitutional infirmity, we will permit juvenile offenders convicted under the law to petition for a review of their sentence after they have served two decades in prison. At that time, judges will assess a series of factors the United States Supreme Court has set forth in Miller v. Alabama, which are designed to consider the "mitigating qualities of youth." 567 U.S. at 476-78 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

We provide for the hearing, rather than strike the homicide statute on constitutional grounds, because we have no doubt the Legislature would want the law to survive. The timing of the hearing is informed by a number of sources, including acts by the Legislature and other officials.

At the hearing, the trial court will assess factors it could not evaluate fully decades before -- namely, whether the juvenile offender still fails to

appreciate risks and consequences, and whether he has matured or been rehabilitated. The court may also consider the juvenile offender's behavior in prison since the time of the offense, among other relevant evidence.

After evaluating all the evidence, the trial court would have discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than 20 years. A juvenile who played a central role in a heinous homicide and then had a history of problematic behavior in prison, and was found to be incorrigible at the time of the later hearing, would be an unlikely candidate for relief. On the other hand, a juvenile who originally acted in response to peer pressure and did not carry out a significant role in the homicide, and who presented proof at the hearing about how he had been rehabilitated and was now fit to reenter society after two decades, could be an appropriate candidate for a lesser sentence and a reduced parole bar.

The Appellate Division rejected the juveniles' constitutional claims. We therefore reverse and remand both matters for resentencing. We express no opinion on the outcome of either hearing.

I.

We discussed the facts underlying defendant James Comer's convictions in a prior opinion. See Zuber, 227 N.J. at 433-34. We briefly refer to the facts again here.

During the evening of April 17 and the early morning of April 18, 2000, Comer and two others participated in four armed robberies. During the second robbery, an accomplice shot and killed a robbery victim. At the time, Comer was 17 years old.

Comer was prosecuted as an adult, and a jury convicted him of felony murder, armed robbery, conspiracy to commit robbery, weapons offenses, and theft. The trial judge originally sentenced Comer in 2004 to an aggregate term of 75 years in prison with 68 years and 3 months of parole ineligibility. The sentence included a term of 30 years' imprisonment with 30 years of parole ineligibility for first-degree felony murder, contrary to N.J.S.A. 2C:11-3(a)(3). The court imposed three consecutive terms of 15 years' imprisonment as well. Comer would not have been eligible for parole until 2068, when he would be 85 years old.

In 2013, Comer filed a motion to correct an illegal sentence. To challenge the constitutionality of his sentence, he relied on recent decisions of the United States Supreme Court such as Graham, 560 U.S. at 82 (banning life without parole for juveniles convicted of non-homicide offenses), and Miller, 567 U.S. at 479-80 (requiring judges to consider qualities associated with youth before sentencing a juvenile to life without parole in homicide cases).

The trial court granted Comer's motion and found he was entitled to be resentenced under the procedures outlined in Miller.

On direct certification, we affirmed the trial court's judgment. In doing so, we extended Miller's reasoning "to sentences that are the practical equivalent of life without parole." Zuber, 227 N.J. at 429. We therefore asked the trial court to conduct a new sentencing hearing and consider factors such as Comer's "immaturity, impetuosity, and failure to appreciate risks and consequences; family and home environment; family and peer pressures; inability to deal with police officers or prosecutors or his own attorney; and the possibility of rehabilitation." Id. at 453 (internal quotation marks omitted) (quoting Miller, 567 U.S. at 478) ("the Miller factors").

The trial court applied and weighed those factors on remand.[1] It found

> that [Comer] grew up in an environment that forced his criminal behavior. [His] parents and extended family had criminal histories and involvement with drugs. The reality of criminal behavior as a way of life was . . . inescapable for [him]. And [he] has shown an ability to be rehabilitated and has been incident free for four years while incarcerated. . . . As a juvenile, [he] may not have been as able to appreciate the criminality of

[1] Among other things, the court heard testimony from an expert psychiatrist who evaluated Comer and prepared a detailed report. The report described defendant's repeated exposure to traumatic events as a child. Because of the sensitive nature of the confidential report, as well as the basis for our ruling, we do not discuss the report or the testimony in detail. Other evidence at the hearing addressed Comer's efforts at rehabilitation and growth.

> his behavior and the impact it would have on others, especially [the victim] and his family.

The trial judge nevertheless imposed the mandatory minimum sentence for felony murder -- 30 years in prison without the possibility of parole. N.J.S.A. 2C:11-3(b)(1). The court declined to find the statute unconstitutional as applied to Comer. The judge also observed that

> [w]hile it is unknown to what degree you will be, or need to be, deterred, it's clear that society abhors the taking of life and our citizens must know that [if] they do so, or participate in a criminal act that results in death, they are subject to a minimum of 30 years in prison.

The court added that a 30-year period of parole ineligibility was "appropriate in this case" and that it did not need to reach the constitutional issue. In light of the Miller factors and State v. Yarbough, 100 N.J. 627 (1985), the court did not impose consecutive sentences on the remaining counts of conviction.

Comer appealed and again argued that a mandatory minimum sentence of 30 years without parole is unconstitutional as applied to juveniles. The Appellate Division rejected the claim. The court relied heavily on a prior appellate ruling in State v. Pratt, 226 N.J. Super. 307 (App. Div. 1988), which upheld a similar sentence imposed on a juvenile offender against a constitutional challenge. In its discussion about whether a 30-year sentence without parole constituted cruel and unusual punishment, the court in Pratt

noted "that public concern about unrehabilitated, violent youthful offenders has 'stimulated a "just deserts" approach to juvenile crime.'" Id. at 326 (quoting State v. R.G.D., 108 N.J. 1, 8 (1987)). Pratt also recognized that murder is "the most heinous and vile offense proscribed by our criminal laws," and accordingly found that the mandatory punishment did not violate constitutional principles. Id. at 326-27 (quoting State v. Serrone, 95 N.J. 23, 27 (1983)).

The Appellate Division here found that "Pratt is directly on point and remains good law." Because Miller and Zuber "addressed life sentences and their equivalents," the court concluded that neither case "require[d] reversal of Pratt." The court also distinguished State in Interest of C.K., 233 N.J. 44 (2018), which we discuss further below.

In upholding Comer's sentence, the Appellate Division acknowledged the complexity of the issue before it and added it was not "appropriate for this intermediate appellate court to discard longstanding precedent."

We granted Comer's petition for certification. 245 N.J. 484 (2021). We also granted leave to appear as amici curiae to the Association of Criminal Defense Lawyers of New Jersey (ACDL) and to the Campaign for the Fair Sentencing of Youth, joined by six other organizations. The Attorney General

and the Public Defender appeared before the Appellate Division and continued to participate in this appeal. See R. 1:13-9(d).

II.

Defendant James Zarate was convicted of participating in a brutal murder with his then-18-year-old brother, Jonathan.[2] At the time of the offense in 2005, Zarate was 14 years old, less than one month shy of his fifteenth birthday.

We briefly recount the disturbing facts of the crime. Zarate lived with his father and stepmother in 2003, next door to J.P. and her family. According to J.P.'s mother, Zarate and J.P. were in some of the same classes at school, and "he picked on her a lot." J.P.'s mother eventually asked the school to separate the children. She also spoke directly with Zarate and told him to leave J.P. alone. The next day, a brick was thrown through the rear window of her car. J.P.'s mother contacted the police and signed a harassment complaint against Zarate. After the incident, Zarate had to move to another town and live with his mother. The charges were ultimately dismissed.

Two years later, on Saturday, July 30, 2005, J.P.'s parents reported that she was missing to the police. At around 3:00 a.m. on Sunday, a police officer

[2] To avoid confusion, we refer to the defendant as "Zarate" and his brother as "Jonathan."

driving across the Union Avenue Bridge, which spans the Passaic River, spotted a jeep parked on the shoulder of the bridge. The officer saw Zarate and V.B., a friend of Zarate's, attempt to throw a footlocker over the bridge's railing, while Jonathan stood nearby. The footlocker contained J.P.'s body without the lower parts of her legs; her bludgeoned body had multiple stab and knife wounds. Her legs, as well as blood-stained paper towels and some clothing, were found in two garbage bags in the jeep.

The grand jury charged Zarate with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2); two counts of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); two counts of fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); two counts of second-degree disturbing or desecrating human remains, N.J.S.A. 2C:22-1(a)(1); and two counts of third-degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b)(1). The court granted the State's motion to prosecute Zarate as an adult.

Zarate was tried separately from his brother.[3] At trial, the State introduced Zarate's statement to the police shortly after his arrest. In the statement, Zarate said his only role in the crime was to help his older brother dispose of J.P.'s body. Zarate claimed that Jonathan invited J.P. to their house

[3] During Zarate's trial, the court instructed the jury about a stipulation relating to Jonathan. The parties stipulated that he "stood trial alone previously" and had been "convicted by a jury of murder and other crimes."

on the night of the murder. According to Zarate, Jonathan told him after the fact that he beat, stabbed, and killed J.P.; he then cut off her lower legs because her entire body would not fit into the trunk. At Jonathan's request, Zarate helped his brother put the trunk inside their father's jeep. Together, they then drove to pick up V.B. on the way to the bridge so that he could help them throw the trunk into the river.

V.B. cooperated with the State and testified at trial that Zarate and Jonathan told him they both killed J.P. V.B. told the jury that Zarate admitted punching and stabbing J.P. and said that Jonathan choked and punched her. V.B. gave conflicting statements, which the jury heard, before he agreed to cooperate.

A medical examiner who performed an autopsy also testified. Based on the nature of the injuries he observed, he concluded that at least two people attacked the victim. He explained that different wounds to the front and back of J.P.'s body occurred simultaneously before a final, fatal blow to her stomach. The medical examiner also concluded that J.P. was alive when an attempt was made to amputate her right leg.

The jury found Zarate guilty of all counts. He has been sentenced three different times since then.

Zarate was first sentenced on July 31, 2009, ten days before he turned nineteen. During the hearing, he spoke on his own behalf and explained how he looked up to his older brother. After their parents divorced, he considered Jonathan "like a father figure, a parent figure." "[I]f he asked me to do something, I wouldn't even think about it twice. I'd just go ahead and do it," Zarate explained.

Zarate also described how difficult it had been to be incarcerated at an adult facility instead of a juvenile detention center. In his words, "[f]rom 15 to 18, . . . two years and two months, I was locked down for no reason, except for being underage. But there's a quote by a German philosopher, Frederick Nietzsche, that what doesn't kill me, only makes me stronger."

During his allocution, Zarate noted that he "wanted to prepare the best defense [he] could." He stated that he and his family "requested" that his "lawyer . . . file certain motions before trial, but I was always denied. Every time I asked that he object to something, sometimes he would ignore me."

Zarate addressed the victim's family as well. "I would like to apologize for the part of the crime that I did, but I'm innocent of murder. . . . If I could change what I did, I would have. I was a little kid, though, influenced by my brother."

For the murder conviction, the trial court sentenced Zarate to life imprisonment, subject to an 85-percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court also imposed a consecutive term of 4 years' imprisonment for a weapons offense, and a second consecutive term of 9 years for desecrating human remains.

Before imposing sentence, the court considered a psychiatric report Zarate submitted from Dr. Weinapple, and a communication from Zarate's aunt, Dr. Raul, also a psychiatrist. The court noted that the materials referred to the "brain development of young teens." "But," the court observed, "there was no testing that was provided to me showing that there was any lack of brain development." Based on Zarate's educational records -- including a number of items since the offense -- and his organized presentation in court, the trial judge found that Zarate was "bright."

The judge did not directly address mitigating factor thirteen during the hearing. See N.J.S.A. 2C:44-1(b)(13) ("The conduct of a youthful defendant was substantially influenced by another person more mature than the defendant . . . .").

The Appellate Division affirmed Zarate's conviction but remanded for resentencing on a merger issue. It also directed the trial court to address mitigating factor thirteen.

Zarate was resentenced by the same judge on January 17, 2014. The court rejected mitigating factor thirteen and found no proof that Jonathan influenced Zarate. "To the contrary," the judge observed, "he is the one who influenced others." The court cited V.B.'s testimony and noted that only Zarate had a motive to harm J.P. The judge also found Zarate's statements -- that he was asleep on a couch during the murder, and that J.P.'s body was in the footlocker when Jonathan asked for his help -- incredible.

The court again observed that Zarate was a "bright and intelligent individual." The judge pointed to Zarate's educational records since the offense, his "well-organized and intelligent allocution" in 2009 when he quoted Nietzsche, and his requests that his attorney file motions and make objections.

The court also quoted extensively from Dr. Raul's and Dr. Weinapple's submissions and their general comments on brain development. The court noted there was no evidence that Zarate had a psychotic disorder and no neuropsychological testing specific to him. The court referred to another psychiatric report prepared closer in time to the murder, which Dr. Weinapple summarized, that found no specific psychiatric illness.

The trial judge also addressed the Miller factors. Among other points, the court noted that Zarate had a "loving, caring, close-knit family" and that

his sentence was not the equivalent of life without parole. The court added that it had already considered many of the Miller factors, including the circumstances of the offense and Zarate's participation in it.

The trial court resentenced Zarate for murder to life in prison subject to NERA's 85-percent period of parole eligibility. The court did not impose any consecutive sentences. It merged one of the prior consecutive counts with the murder conviction and ran the second count concurrently because of Zarate's recent conduct in prison.

The Appellate Division again reversed and remanded. It instructed "the trial court to reconsider its proportionality analysis in light of the United States Supreme Court's recent opinion in Montgomery v. Louisiana," 577 U.S. 190 (2016). The Appellate Division observed that the 63.75-year parole disqualifier under NERA meant Zarate would not be eligible to be considered for parole until the age of 78.

We granted Zarate's petition for certification and the State's cross-petition and summarily remanded for resentencing in light of our 2017 ruling in Zuber. 229 N.J. 167 (2017); 229 N.J. 140 (2017).

Zarate was resentenced again on November 8, 2017, by the judge who oversaw his trial and two prior sentencing hearings. At the outset, the trial court thoroughly reviewed Zuber as well as relevant recent Supreme Court

case law. In doing so, the court made clear that "permanent incorrigibility is not my finding." Because of Zarate's "potential capacity . . . to reform as an adult," the court explained it had eliminated a consecutive sentence at the last hearing. Yet the court also observed that Zarate had committed seven disciplinary infractions while in jail, including an assault on a corrections officer, and had failed to complete a number of courses he started, including one on anger management.

The court then considered the Miller factors in greater detail and partly recounted certain findings from the earlier hearings. As to the first factor -- the hallmark features of youth, such as immaturity -- the trial court again noted that Zarate was "bright" and "intelligent," which made the factor "less forceful." The judge referred to Zarate's grades, SAT scores, GED, and paralegal coursework since the offense, as well as his "well-organized and intelligent allocution."

The court also reviewed the psychiatric reports and letters and made observations similar to its previous findings. In short, the trial court noted "[t]here was nothing specific, by way of testing or otherwise, that was provided about the defendant's lack of brain development that impacted his participation in these events."

For the second factor -- family and home environment -- the court noted that Zarate's home environment was neither dysfunctional nor brutal. The court found Zarate came from a caring, close-knit, supportive, religious family environment.

For the third factor -- the circumstances of the offense, extent of the defendant's participation, and familial and peer pressures -- the court found that Zarate "participated extensively" in a "brutal, merciless slaying and dismembering." The court saw "little or no pressure from anyone for him to do [what] he did."

As to the fourth factor -- the incompetencies of youth, such as an inability to deal with police officers, prosecutors, or an attorney -- the court found Zarate had shown he had no such difficulties. The court noted that he had persisted with his initial story to the police that he played no role in the murder, and that he had assisted his attorney, "telling [him] what to do" at trial. The court commented that a stipulation about Jonathan was "cunning," adding that Zarate managed to get his statement to the police in evidence without being cross-examined.

Finally, as to the fifth factor -- the possibility of rehabilitation -- the court acknowledged that Zarate had taken steps towards rehabilitation but found they were offset to some extent by his prison infractions. In addition,

the court observed that Zarate still denied he had participated in the murder despite overwhelming proof to the contrary. The court found that Zarate showed no remorse for his actual role in the offense.

After weighing other statutory factors, the court resentenced Zarate for murder to 50 years in prison. Consistent with NERA, Zarate must serve 85 percent of that term before he is eligible for parole. The court either merged or imposed concurrent sentences on the other counts of conviction. According to the State, Zarate will be 56 years old when he is first eligible for parole. In a separate order, the court denied Zarate's motion to bar a term of imprisonment in excess of 30 years as cruel and unusual punishment.

Zarate appealed, and the Appellate Division modified and affirmed his sentence. We consider only those parts of the court's ruling that relate to the limited grant of certification.

The Appellate Division assumed, without deciding, that Zarate's sentence was the functional equivalent of life without parole and that the Miller factors therefore applied. The court nevertheless was not persuaded that the trial judge misapplied the factors. The appellate court deferred to the trial judge's interpretation of the psychological reports and trial evidence. As to the length of the sentence, the court acknowledged it is difficult to predict whether Zarate "will ever gain the capacity for rehabilitation." Consistent

with Zuber, the Appellate Division declined to foreclose the possibility that Zarate might one day be able to return to court to show "that he has sufficiently reformed himself to a degree that" his sentence is "no longer . . . constitutional under the Eighth Amendment."

We granted part of Zarate's petition for certification.[4] 245 N.J. 485 (2021). We also granted amicus status to the ACDL and to the Campaign for the Fair Sentencing of Youth, joined by six other organizations. The Attorney General and the ACLU appeared before the Appellate Division and continued to participate in this appeal. See R. 1:13-9(d).

III.

The parties and amici in both appeals present certain overlapping arguments. Comer and Zarate contend that a mandatory sentence of at least 30 years without parole, which N.J.S.A. 2C:11-3(b)(1) requires, is unconstitutional as applied to juveniles. Along with the ACLU and the ACDL, defendants argue the law constitutes cruel and unusual punishment within the meaning of the Federal and State Constitutions. Among other arguments, they stress the law divests sentencing judges of discretion to apply mitigating factors that apply to youth and does not adequately reflect a juvenile's

[4] Zarate's claim that he should have been resentenced before the Family Part -- because of a statutory change in 2015 that raised the minimum age for waiver to 15 -- is not part of this appeal. 245 N.J. 485 (2021).

diminished moral culpability. They also maintain the Court must resolve the fundamental constitutional question presented.

Zarate additionally argues it is unconstitutional to sentence a juvenile to the functional equivalent of life without parole after finding the person is not permanently incorrigible. He also contends the trial court's analysis of the Miller factors in his case was flawed.

The ACLU argues in support of Zarate that, under the State Constitution, juveniles sentenced to lengthy periods of parole ineligibility must be afforded an opportunity to review their sentences after no more than 15 years. The organization relies on social science research that they submit shows juveniles "age out of crime within 15 years."

The State and the Attorney General advance the opposite position and maintain the homicide statute is constitutional as applied to juveniles who are waived to adult court. The law's mandatory minimum features, they submit, do not amount to cruel and unusual punishment under either the Federal or State Constitutions. They also contend the Court should defer to the Legislature, which is considering whether and when defendants might apply to be resentenced.

The Attorney General in Zarate's case submits that the Court should rely on its supervisory authority to direct sentencing judges to consider the Miller

factors when they assess whether to impose a sentence of more than 30 years without parole.

The Campaign for the Fair Sentencing of Youth agrees with defendants' constitutional arguments. The group also presents the stories of ten juvenile offenders, each convicted of homicide, to show the capacity juveniles have to reform and contribute to society.

IV.

Comer and Zarate both contend their sentences violate the Eighth Amendment to the United States Constitution and Article I, Paragraph 12 of the State Constitution.

The Eighth Amendment provides that "[e]xcessive bail shall not be required . . . nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment and its protections apply to the States through the Fourteenth Amendment. Roper v. Simmons, 543 U.S. 551, 560 (2005); Robinson v. California, 370 U.S. 660, 666 (1962).

The Eighth Amendment's prohibition against cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" Roper, 543 U.S. at 560 (alteration in original) (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)). "Courts interpret the Eighth Amendment 'according to its text, by

considering history, tradition, and precedent . . . .'" Zuber, 227 N.J. at 438 (quoting Roper, 543 U.S. at 560). The interpretive process "often requires 'refer[ence] to the evolving standards of decency that mark the progress of a maturing society.'" Ibid. (alteration in original) (quoting Roper, 543 U.S. at 561).

Article I, Paragraph 12 of the New Jersey Constitution also bars cruel and unusual punishment. To determine whether a punishment is cruel and unusual, it is appropriate to conduct an independent analysis under the State Constitution. State v. Ramseur, 106 N.J. 123, 182 (1987). The test under both Constitutions is "generally the same": "First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?" Zuber, 227 N.J. at 438 (quoting Ramseur, 106 N.J. at 169). If the punishment fails under any one of the three inquiries, "it is invalid." State v. Gerald, 113 N.J. 40, 78 (1988).

To assess the first prong, courts consider legislation enacted in their home state and other states, among other sources. Roper, 543 U.S. at 564-68. As to the second prong, courts weigh "the culpability of the offenders . . . in light of their crimes and characteristics, along with the severity of the

punishment in question." Graham, 560 U.S. at 67 (citing Roper, 543 U.S. at 568). For the third prong, courts assess whether the traditional penological goals of retribution, deterrence, incapacitation, and rehabilitation adequately justify the punishment. Id. at 71-74.

Although the test is similar under federal and state law, our State Constitution can confer greater protection than the Eighth Amendment affords. See Zuber, 227 N.J. at 438; Gerald, 113 N.J. at 76. That said, statutes are presumed constitutional. State v. A.T.C., 239 N.J. 450, 466 (2019); Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 172 (2011). A statute "will not be declared void unless its repugnancy to the constitution is clear beyond a reasonable doubt." Gangemi v. Berry, 25 N.J. 1, 10 (1957).

A.

Since 2005, the United States Supreme Court has written extensively about juvenile sentencing. We reviewed several of the Court's decisions in Zuber and borrow freely from that discussion. 227 N.J. at 439-46. Collectively, the rulings "establish that children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471.

1.

In Roper v. Simmons, the Court banned capital punishment for juveniles under the Eighth Amendment. 543 U.S. at 578. To begin, the Court reviewed

"objective indicia" of a consensus among the states about sentencing juveniles to death. Id. at 564. The Court focused on the "consistency of the direction of change" rather than the number of states that had abolished the death penalty for juveniles. Id. at 566 (quoting Atkins, 536 U.S. at 315). The Court then turned to "[t]hree general differences between juveniles under 18 and adults, [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Id. at 569.

First, the Court recognized that juveniles are less mature and responsible than adults. Ibid. For support, the opinion relied on scientific and social science studies as well as plain common sense. Ibid. The disparity, the Court explained, "often result[s] in impetuous and ill-considered actions and decisions." Ibid. (quoting Johnson, 509 U.S. at 367). Second, the Court emphasized the role external pressures can play. "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" and "have less control . . . over their own environment." Ibid. Third, the Court noted "that the character of a juvenile is not as well formed as that of an adult," and that juveniles' "personality traits . . . are more transitory, [and] less fixed." Id. at 570.

Taken together, the differences tell us that a juvenile's "irresponsible conduct is not as morally reprehensible as" the behavior of an adult. Ibid.

(quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)). Because of the "signature qualities of youth," the Court explained, "the penological justifications for the death penalty apply . . . with lesser force" to juveniles. Id. at 570-71. In that context, the Court observed that "[i]t is difficult even for expert psychologists" to determine whether a juvenile's behavior reflects "transient immaturity" or "irreparable corruption." Id. at 573.

2.

The Court built on that foundation in Graham v. Florida, which barred sentences of life without parole for juveniles convicted of non-homicide offenses. 560 U.S. at 82.

As in Roper, the Court first looked to "objective indicia of national consensus." Id. at 62. Although a majority of states permitted life-without-parole sentences for juveniles at that time, "actual sentencing practices" revealed they were rarely imposed. Ibid.

The Court next underscored certain findings in Roper about the "nature of juveniles," relying in part on scientific evidence. Id. at 68. The Court once again highlighted that children's actions are "not as morally reprehensible as" adults'. Ibid. (quoting Thompson, 487 U.S. at 835). In the context of murder, the Court observed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. at 69.

Finally, as with capital punishment for juveniles, the Court concluded that none of the traditional goals of sentencing provided an "adequate justification" for a sentence of life without parole for a juvenile. Id. at 71. The Court found it was "an especially harsh punishment for a juvenile." Id. at 70.

The Court made clear that states are "not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." Id. at 75. But they may not "ma[ke] the judgment at the outset that" a youthful offender will never "be fit to reenter society." Ibid. Instead, states must "give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Ibid.

3.

Miller v. Alabama extended Graham's ban on life-without-parole sentences for juveniles to homicide offenses. 567 U.S. at 465.

The Court reiterated its findings about children in Roper and Graham and emphasized that "none of what it said" about their traits and vulnerabilities "is crime-specific." Id. at 473. The Court added that the scientific evidence underlying its earlier rulings has "become even stronger." Id. at 472 n.5.

Once again, the Court explained that "children are constitutionally different from adults for purposes of sentencing" and "have diminished

culpability and greater prospects for reform." Id. at 471. Mandatory sentencing schemes, though, "prevent the sentencer from taking" the circumstances of youth into account. Id. at 474.

The Court also turned to another line of case law that "demand[s] individualized sentencing when imposing the death penalty." Id. at 475. Those cases require that sentencing judges "have the ability to consider the 'mitigating qualities of youth.'" Id. at 476 (quoting Johnson, 509 U.S. at 367).

With those principles in mind, the Court listed five factors that "are particularly instructive for sentencing judges." Zuber, 227 N.J. at 445.

> Mandatory life without parole for a juvenile
>
> > [1] precludes consideration of his chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences.
> >
> > [2] It prevents taking into account the family and home environment that surrounds him -- and from which he cannot usually extricate himself -- no matter how brutal or dysfunctional.
> >
> > [3] It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him.
> >
> > [4] Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors

> (including on a plea agreement) or his incapacity to assist his own attorneys.
>
> [5] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.
>
> [Miller, 567 U.S. at 477-78 (citations omitted).]

Miller did not rule out the possibility of life without parole for a juvenile who commits homicide. Id. at 479-80. Instead, it requires judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." Id. at 480. The Court also observed that the harsh penalty "will be uncommon" because of the "difficulty . . . of distinguishing at [an] early age between . . . 'transient immaturity[] and the rare juvenile offender whose crime reflects irreparable corruption'" at an early stage. Id. at 479-80 (quoting Roper, 543 U.S. at 573).

Four years later, in Montgomery v. Louisiana, the Court held that Miller applied retroactively. 577 U.S. 190, 208-09 (2016). In Jones v. Mississippi, the Court recently ruled that "a separate factual finding of permanent incorrigibility is not required before a" judge can sentence a juvenile to life without parole. 593 U.S. ___, 141 S. Ct. 1307, 1318-19 (2021). Three Justices, in dissent, said the decision distorted Miller and Montgomery. Id. at 1330 (Sotomayor, J., dissenting).

The majority opinion added that its holding did "not preclude the States from imposing additional sentencing limits in cases" in which juveniles are convicted of murder. Id. at 1323.

B.

In State v. Zuber, this Court extended Miller to sentences that are the practical equivalent of life without parole. 227 N.J. at 429, 446-47. Our decision relied on the State Constitution and requires judges to evaluate the Miller factors before sentencing juveniles to a lengthy term of parole ineligibility. Id. at 429, 447. Because the proper focus "belongs on the real-time consequences of [an] aggregate sentence," Zuber's holding applies to cases that involve a single event or multiple offenses at different times when counts of conviction might be run consecutively. Id. at 447.

The Court in Zuber underscored one of Graham's concerns: the inability to determine at the moment of sentencing whether a juvenile might one day be fit to reenter society. Id. at 451. We also noted that some "juveniles will receive lengthy sentences with substantial periods of parole ineligibility" and may well return to court decades later to challenge the constitutionality of their sentence. Ibid. They "might ask the court to review factors that could not be fully assessed when they were originally sentenced -- like whether they still

fail to appreciate risks and consequences, or whether they may be, or have been, rehabilitated." Id. at 452 (altered to plural).

We recognized that such a claim "would raise serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date." Ibid. We therefore "encourage[d] the Legislature to examine [the] issue" "[t]o avoid a potential constitutional challenge in the future." Ibid. We asked "the Legislature to consider enacting a scheme that provides for later review of juvenile sentences with lengthy periods of parole ineligibility." Id. at 453. Zuber did not specify how many years of parole ineligibility are the equivalent of life without parole or when juvenile offenders might be entitled to have their sentences reviewed.

Since Zuber was decided in 2017, a number of bills relating to the issue have been introduced or reintroduced in the Legislature. See A. 4372 (June 29, 2020); S. 2591 (June 22, 2020); A. 3091 (Feb. 24, 2020) (previously introduced as A. 1233 (Jan. 9, 2018) and A. 4678 (Mar. 16, 2017)); S. 428 (Jan. 9, 2018) (previously introduced as S. 3079 (Mar. 13, 2017)). None of them have been enacted. One bill passed the Assembly and is pending in the Senate. See A. 4372/S. 2591 (allowing juveniles sentenced to 30 years or more who have served at least 20 years to petition for resentencing).

In a related context, this Court in State in Interest of C.K. found that a provision in Megan's Law was unconstitutional as applied to juveniles. 233 N.J. at 47-48. The statutory section prevented anyone convicted or adjudicated delinquent of certain sex offenses from applying to terminate the law's lifetime registration and notification requirements. N.J.S.A. 2C:7-2(g).

As part of our analysis, we relied on mitigating principles about juveniles set forth in Roper, Graham, Miller, and Zuber. C.K., 233 N.J. at 68-70. We concluded the statute lacked a rational basis and violated the substantive due process guarantee in the State Constitution. Id. at 48, 72-73 (interpreting N.J. Const. art. I, ¶ 1). The Court did not address C.K.'s claim under the Eighth Amendment or Article I, Paragraph 12 of the State Constitution.

V.

Other states have also addressed lengthy mandatory minimum sentences and parole bars for juvenile offenders. Thirteen states and the District of Columbia now have statutes that allow juvenile offenders to be considered for release before 30 years have passed. Some states afford juveniles a chance at parole; others grant them an opportunity to be resentenced.

A few states had legislation in effect at the time of the Supreme Court's rulings in Graham or Miller. See Cal. Penal Code § 1170(d)(2)(A)(i) (2011)

(juvenile offenders sentenced to life without parole may petition the court for resentencing after 15 years); Ky. Rev. Stat. Ann. § 640.040(1) (1987) (juvenile offenders eligible for parole after 25 years for capital offenses); La. Child. Code, art. 857(B) (1994) (prohibiting confinement of 14-year-old offenders convicted in adult court beyond age 31). Montana exempts juvenile offenders from mandatory sentences of life without parole and restrictions on parole eligibility. Mont. Code Ann. § 46-18-222(1) (1991).

Notably, since Graham and Miller, nine other states and the District of Columbia have enacted similar legislation. See D.C. Code § 24-403.03(a) (2017) (judicial review of sentences after 15 years for offenses committed before age 18; amended to before age 25 in 2021); Fla. Stat. § 921.1402 (2014) (judicial review of sentences imposed on juvenile offenders after 15, 20, or 25 years, depending on the length of the original sentence); 730 Ill. Comp. Stat. § 5/5-4.5-115 (2019) (for offenses committed before age 21, individuals eligible for parole after 20 years for first-degree murder and after 10 years for other offenses, with some exceptions); N.C. Gen. Stat. § 15A-1340.19A (2012) (juvenile offenders eligible for parole after 25 years for first-degree murder); N.D. Cent. Code § 12.1-32-13.1(1) (2017) (courts may reduce sentences after 20 years for juvenile offenders convicted as adults); Or. Rev. Stat. § 144.397(1)(a) (2020) (juvenile offenders eligible for parole after 15 years);

Va. Code Ann. § 53.1-165.1(E) (2020) (juvenile offenders eligible for parole after 20 years); Wash. Rev. Code § 9.94A.730(1) (2014) (juvenile offenders may petition the sentencing review board for release after 20 years); W. Va. Code § 61-11-23(b) (2014) (juvenile offenders sentenced to more than 15 years eligible for parole after 15 years); Wyo. Stat. Ann. § 6-10-301(c) (2013) (juvenile offenders sentenced to life in prison eligible for parole after 25 years); see also Cal. Penal Code § 3051(b) (2014) (parole eligibility after 15, 20, or 25 years, depending on the length of the original sentence, for offenses committed by juveniles or individuals age 25 or younger).

Other states fix longer periods of parole ineligibility for juveniles for very serious offenses. See Ark. Code Ann. § 16-93-621 (2017) (juvenile offenders eligible for parole after 30 years for capital murder, after 25 years for first-degree murder, and after 20 years for other offenses); Colo. Rev. Stat. § 17-34-102 (2016) (juvenile offenders who complete a specialized program are eligible for parole after 30 years for first-degree murder and after 25 years for other offenses); Del. Code Ann. tit. 11, § 4204A(d)(1) to (2) (2013) (juvenile offenders may petition the court for a sentence modification after 30 years for first-degree homicide and after 20 years for other offenses); Mass. Gen. Laws Ch. 279, § 24 (2014) (minimum term of 20 to 30 years for juvenile offenders convicted of murder depending on the nature of the offense); Nev.

Rev. Stat. § 213.12135 (2015) (juvenile offenders convicted of an offense that resulted in the death of one victim eligible for parole after more than 20 years, and eligible after 15 years for offenses that did not result in the death of a victim; statute does not apply to juvenile offenders convicted of offenses that resulted in the death of two or more victims); Ohio Rev. Code Ann. § 2967.132(C) (2021) (parole eligibility for juvenile offenders after 30 years for multiple non-aggravated homicides and after 18 or 25 years for other offenses).

Two State Supreme Courts have also issued rulings that ban mandatory minimum sentences for juvenile offenders. In 2014, the Iowa Supreme Court in State v. Lyle held that "sentence[s] of incarceration . . . for juvenile offenders with no opportunity for parole until a minimum period of time has been served" violate the Iowa Constitution. 854 N.W.2d 378, 380 (2014).

In that case, the 17-year-old offender, Lyle, was convicted of robbery for punching another juvenile and taking a small bag of marijuana from him. Id. at 381. Lyle was sentenced to a mandatory term of 10 years in prison with no opportunity for parole until he served 7 years. Ibid.

The Iowa Supreme Court reviewed Roper, Graham, and Miller and considered Lyle's challenge to his sentence under the State Constitution's ban on cruel and unusual punishment. Id. at 392-98. Relying on the Iowa

Constitution, the Court "conclude[d that] all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional." Id. at 400. As the Court explained,

> [m]andatory minimum sentences for juveniles are simply too punitive for what we know about juveniles. Furthermore, we do not believe this conclusion is inconsistent with the consensus of Iowans. . . . [W]e think most parents would be stunned to learn this state had a sentencing schema for juvenile offenders that required courts to imprison all youthful offenders for conduct that constituted a forcible felony without looking behind the label of the crime into the details of the particular offense and the individual circumstances of the child.
>
> [Id. at 400-01.]

The Lyle Court also stressed its understanding of Miller: "the heart of the constitutional infirmity with the punishment imposed in Miller was its mandatory imposition, not the length of the sentence." Id. at 401. That flaw, according to the Court, applied not only to mandatory sentences for the most serious crimes but also to mandatory sentences for less serious offenses that resulted in a shorter minimum period of parole ineligibility. Ibid. In essence, the Court found that Miller's reasoning applied even to short sentences that deprive a trial judge of discretion to craft "a punishment that serves the best interests of the child and of society." Id. at 402.

Three justices dissented, id. at 404, 407, and a number of state supreme courts have not followed Lyle, see, e.g., Burrell v. State, 207 A.3d 137, 144 (Del. 2019); State v. Anderson, 87 N.E.3d 1203, 1211 (Ohio 2017); State v. Taylor G., 110 A.3d 338, 349 n.8 (Conn. 2015).

In 2017, the Washington Supreme Court concluded that judges "must have absolute discretion to depart" from mandatory minimum sentences when they sentence juveniles in adult court. State v. Houston-Sconiers, 391 P.3d 409, 414 (Wash. 2017). The Court rested its decision on the Eighth Amendment.

In the case, 17-year-old Zyion Houston-Sconiers and 16-year-old Treson Roberts met up with three friends at Roberts' home on Halloween. Ibid. They drank vodka, smoked marijuana, and played basketball before they left the house. Ibid. The two teenagers then displayed a gun and robbed candy from groups of children who were trick-or-treating, and a cellphone from an adult. Id. at 414-15.

Under Washington state law, Houston-Sconiers and Roberts were automatically transferred to adult court on robbery charges and were later convicted of multiple counts. Id. at 415. Because of mandatory sentencing enhancements tied to the use of a firearm, the two were required to serve, respectively, 31 years and 26 years of "flat time" in prison -- time without the

possibility of early release. Id. at 416. The trial court accepted the prosecution's recommendation and imposed no jail time on the substantive offenses; mandatory firearm enhancements drove both sentences. Ibid.

On appeal, the Washington Supreme Court held that under the Eighth Amendment and Miller in particular, "sentencing courts must have complete discretion to consider mitigating circumstances associated with . . . youth" at sentencing. Id. at 420. The Court therefore overruled state statutes that "bar[red] such discretion." Ibid.

VI.

The above principles and developments inform defendants' constitutional challenge, which we turn to now.

Both juveniles were sentenced under a statute that required them to serve a minimum of 30 years in prison with no possibility of parole. N.J.S.A. 2C:11-3(b)(1). We assess that scheme under the three-part test outlined above to determine if the punishment violates the State Constitution.

A.

The test's first part asks whether "the punishment for the crime conform[s] with contemporary standards of decency." Zuber, 227 N.J. at 438 (quoting Ramseur, 106 N.J. at 169). Of particular concern here is whether a mandatory minimum period of 30 years in jail -- with no discretion for a judge

to assess the details of the offense or the circumstances of the juvenile -- reflects contemporary standards of decency.

Although recent federal case law involved lengthier sentences and the imposition of the death penalty, see Miller, 567 U.S. 460; Graham, 560 U.S. 48; Roper, 543 U.S. 551, the Supreme Court's pronouncements about juveniles resonate more broadly. As the Court has noted time and again, children are different. They lack maturity and are more vulnerable to outside pressures than adults. Roper, 543 U.S. at 569. They can be impetuous and fail to appreciate risks and consequences. Miller, 567 U.S. at 477. Their character is not as well formed as adult offenders. Roper, 543 U.S. at 570. And they are often unable to deal with police officers and prosecutors, or to assist in their own defense. Miller, 567 U.S. at 477-78.

Those contemporary observations apply generally to juveniles; they are not crime-specific. Id. at 473. In essence, case law tells us what we know from experience: the qualities of youth matter in everyday life, just as they matter under the Constitution. See Zuber, 227 N.J. at 448.

We know as well that courts cannot determine at the outset that a juvenile will never be fit to reenter society. Graham, 560 U.S. at 75. As noted earlier, it is difficult even for experts to assess whether a juvenile's criminal behavior is a sign of transient immaturity or irreparable corruption. Roper,

543 U.S. at 573. From a practical and moral standpoint, there is "a greater possibility . . . that a minor's character deficiencies will be reformed" than an adult's. Id. at 570. In the context of life without parole, the Supreme Court therefore observed that states "must . . . give [juveniles] some meaningful opportunity to" demonstrate their "maturity and rehabilitation" "to obtain release." Graham, 560 U.S. at 75. In other words, they must be given a chance to show they are fit to reenter society. Ibid. Juveniles sentenced under N.J.S.A. 2C:11-3(b) are not given that opportunity for at least three decades.

Legislative pronouncements also provide a clear and reliable objective source of contemporary standards. Atkins, 536 U.S. at 312. The Legislature fixed the maximum sentence in the Family Part for a juvenile found to have committed murder at 20 years. N.J.S.A. 2A:4A-44(d)(1)(a). It set the maximum in the Family Part for felony murder at 10 years. N.J.S.A. 2A:4A-44(d)(1)(b). To be sure, the penalty is higher if a juvenile is waived up and treated as an adult. But those statutes reflect the Legislature's view that a juvenile who has deliberately taken someone's life should not serve more than two decades in prison.

In addition, the Legislature recently amended the sentencing statute, which now requires judges to consider youth as a mitigating factor at the time of sentencing. N.J.S.A. 2C:44-1(b)(14) ("The defendant was under 26 years of

age at the time of the commission of the offense."). When a juvenile is sentenced to a 30-year term under N.J.S.A. 2C:11-3(b)(1), however, no consideration can be given to the person's youthful status.

The Legislature recently took other steps as well to provide added protections for juvenile offenders. For example, it amended the waiver statute to raise the minimum age for a juvenile to be waived to adult court from 14 to 15. L. 2015, c. 89, §1 (codified at N.J.S.A. 2A:4A-26.1(c)(1)). The Legislature also eliminated life-without-parole sentences for juveniles in response to Zuber. L. 2017, c. 150, §1 (codified at 2C:11-3(b)(5)). But the Legislature has not amended the sentencing range for murder under N.J.S.A. 2C:11-3(b)(1).

We also note the growing trend in other states to allow juveniles an opportunity for release before they spend three decades in jail. See Atkins, 536 U.S. at 312. As the Supreme Court noted in conducting a proportionality review in Atkins, "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change." Id. at 315.

Today, in at least 13 states and the District of Columbia, juveniles can be paroled or resentenced before serving 30 years in prison. As discussed above in section V, most of those states passed laws that allow for lesser sentences after Graham and Miller. And two recent State Supreme Court decisions held

that mandatory minimum sentences for juveniles constitute cruel and unusual punishment. Lyle, 854 N.W.2d at 400; Houston-Sconiers, 391 P.3d at 420, 422.

Actual sentencing practices are also a relevant factor. Graham, 560 U.S. at 62. Since Montgomery held that Miller applies retroactively, approximately 1,300 juvenile offenders serving life without parole throughout the nation have had their sentences reduced to a median term of "25 years before parole or release eligibility." Campaign for the Fair Sent'g of Youth, Montgomery Momentum: Two Years of Progress Since Montgomery v. Louisiana 4 (2018), https://cfsy.org/wp-content/uploads/Montgomery-Anniversary-2018-Snapshot1.pdf; see also Jones, 141 S. Ct. at 1322 (noting that in Mississippi "Miller has reduced life-without-parole sentences for murderers under 18 by about 75 percent") (citing Campaign for the Fair Sent'g of Youth, Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children 7 (2018)).

Those sources and trends all suggest that a 30-year parole bar does not conform to contemporary standards of decency. We do not rely on Pratt's dated views about juveniles who commit crimes. The 1988 Appellate Division decision predates more recent observations about juvenile punishment by the

United States Supreme Court and this Court. Also, Pratt is not binding authority on this Court.

B.

The second component of the constitutional test asks whether "the punishment [is] grossly disproportionate to the offense." Zuber, 227 N.J. at 438 (quoting Ramseur, 106 N.J. at 169).

Murder, of course, is an egregious offense that calls for serious punishment. See Serrone, 95 N.J. at 27. But there are limits, as the Supreme Court noted when it held that a sentence of "[l]ife without parole is an especially harsh punishment for a juvenile." Graham, 560 U.S. at 70. A 30-year parole bar raises related concerns.

Because children lack maturity and responsibility, which can lead to "ill-considered actions," because they "are more vulnerable to negative influences and outside pressures," and because their character "is not as well formed" as an adult's, their misconduct is not as morally culpable as an adult's. Roper, 543 U.S. at 569-70. For those reasons, recent case law calls on judges to consider mitigating qualities of youth that reflect their diminished culpability. See Miller, 567 U.S. at 477; Zuber, 227 N.J. at 447. Yet neither a sentence of life without parole, as in Miller, nor a 30-year parole bar under the homicide statute leave room for any such analysis.

In the case of felony murder, "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Graham, 560 U.S. at 69. Under the felony-murder doctrine, a "death caused in the course of a felony [is attributed] to all participants who intended to commit the felony, regardless of whether they killed or intended to kill." Miller, 567 U.S. at 491 (Breyer, J., concurring). Yet some of the hallmark characteristics of young adults -- like rash behavior and an inability to appreciate risks and consequences, id. at 477 -- can contribute to circumstances that lead to felony murder.

As noted earlier, cases that remain in the Family Part illustrate the distinction between felony murder and purposeful murder. Juveniles adjudicated of felony murder face up to 10 years in prison; those adjudicated of purposeful and knowing murder face up to 20 years. N.J.S.A. 2A:4A-44(d)(1)(a), (b). The distinction disappears for juveniles convicted as adults, even though they are less morally culpable.

The diminished culpability of juvenile offenders suggests that the severity of a 30-year parole bar for juveniles, in many cases, may be grossly disproportionate to the underlying offense.

C.

The final part of the constitutional test asks whether "the punishment go[es] beyond what is necessary to accomplish any legitimate penological objective." Zuber, 227 N.J. at 438 (quoting Ramseur, 106 N.J. at 169). Here as well, because of the diminished culpability of juveniles, the traditional penological justifications -- retribution, deterrence, incapacitation, and rehabilitation -- "apply . . . with lesser force than to adults." Roper, 543 U.S. at 571.

That principle applies directly to the concept of retribution. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987); accord Graham, 560 U.S. at 71. As a result, "the case for retribution is not as strong with a minor" because the "culpability or blameworthiness" of a juvenile is diminished on account of "youth and immaturity." Roper, 543 U.S. at 571. Juveniles are still responsible for their actions, but their "transgression 'is not as morally reprehensible as that of an adult.'" Graham, 560 U.S. at 68 (citing Thompson, 487 U.S. at 835).

Similarly, the threat of a lengthy jail sentence is less of a deterrent for juveniles than adults. "[T]he same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to

deterrence." Id. at 72 (omission in original) (quoting Roper, 543 U.S. at 571). They are less likely to take possible punishment into account when making impulsive, ill-considered decisions that stem from immaturity. Ibid.; see also Thompson, 487 U.S. at 837.

The core rationale for incapacitation is the need to protect the public. Yet even experts, as noted before, cannot predict whether a juvenile's criminal behavior "reflects unfortunate yet transient immaturity" or the "rare" situation of a minor who is "irreparabl[y] corrupt[]." Roper, 543 U.S. at 573.

Research reveals that most juveniles desist from crime before 30 years have passed from the time of their offense. Scientists refer to that as the "age-crime curve," which shows "that more than 90% of all juvenile offenders desist from crime by their mid-20s." Laurence Steinberg, The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability, 14 Neuroscience 513, 516 (2013);[5] see also Terrie E. Moffitt,

[5] The cited article explains that

> [i]n general, adolescents and individuals in their early 20s are more likely than either children or somewhat older adults to engage in risky behaviour; most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid- or late adolescence (the peak age varies depending on the specific type of risk activity) and declining thereafter. Involvement in violent and

Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psych. Rev. 674, 675 (1993) ("When official rates of crime are plotted against age, the rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood."). The "age-crime curve" is at odds with the notion that juveniles, as a category of offenders, must be incapacitated for several decades to protect the public.

Finally, as to rehabilitation, a child's brain matures as the child grows older, including parts of the brain involved in impulse control. Miller, 567 U.S. at 472 n.5 (citing authorities); Graham, 560 U.S. at 68 (same). And juveniles are also more capable of change than adults. Graham, 560 U.S. at 68. A mandatory period of three decades in prison does not foster that type of growth or change. Nor does it serve to rehabilitate young adults in the way the State's juvenile justice system does. See C.K., 233 N.J. 67 ("Rehabilitation and reformation of the juvenile remain a hallmark of the juvenile system . . . ."). In addition, notwithstanding rehabilitative services in jail, individuals who serve lengthy prison terms often face greater challenges reintegrating into

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> non-violent crime also follow this pattern and is referred to as the "age-crime curve."
>
> [Steinberg, 14 Neuroscience at 515.]

society. See Columbia Univ. Ctr. for Just., Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety 62 (2015). Rehabilitation cannot justify mandatory minimum sentences of 30 years for juveniles regardless of the individual facts and circumstances of a case.

D.

In our judgment, the length of a sentence in cases like the ones on appeal is not the key constitutional issue. We recognize that some juvenile offenders should receive and serve very lengthy sentences because of the nature of the offense and of the offender. By itself, that outcome does not necessarily trigger a constitutional concern provided appropriate limits and safeguards are followed. See, e.g., Graham 560 U.S. at 74 (barring sentences of life without parole for non-homicide offenses); Zuber, 227 N.J. at 429 (requiring judges to consider the Miller factors).

Instead, the constitutional concern here is twofold: the court's lack of discretion to assess a juvenile's individual circumstances and the details of the offense before imposing a decades-long sentence with no possibility of parole; and the court's inability to review the original sentence later, when relevant information that could not be foreseen might be presented.

More specifically, trial judges cannot consider how particular juvenile offenders differ from adults in ordering a sentence of three decades in prison;

the Miller factors come into play only for any additional jail time imposed. Plus judges cannot fully consider certain factors relevant to youth when they first sentence a juvenile offender, and cannot review a lengthy sentence at a later date to assess whether the individual has matured or shown proof of rehabilitation. See Graham, 560 U.S. at 75; Zuber, 227 N.J. at 451.

Against the backdrop of the United States Supreme Court's pronouncements on juvenile offenders and our prior holding in Zuber, the existing statutory scheme runs afoul of Article I, Paragraph 12 of the State Constitution. It presents the very situation this Court highlighted in Zuber: the imposition of lengthy sentences with substantial periods of parole ineligibility on juveniles, which cannot be reviewed at a later time. Zuber, 227 N.J. at 451-52.

That concern does not require us to strike the homicide statute as it applies to juveniles. Allowing minors a later opportunity to show they have matured, to present evidence of their rehabilitation, and to try to prove they are fit to reenter society would address the problem posed. See Graham, 560 U.S. at 75, 79.

To save the statute from constitutional infirmity, we therefore hold under the State Constitution that juveniles may petition the court to review their sentence after 20 years. Precedential case law supports that approach.

Courts have added procedures to statutes that would otherwise be unconstitutional to "save them from infirmity." Callen v. Sherman's, Inc., 92 N.J. 114, 134 (1983) (prescribing a notice and hearing requirement that landlords must follow in most cases, before padlocking a tenant's property to collect a debt, in order to save an unconstitutional statute); see also Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutory Construction § 45:11, at 75-79 (7th ed. 2014) ("Courts . . . may imply constitutionally requisite procedures for a statute's administration to preserve its validity.").

Courts have also implied additional provisions "to rescue statutes from being invalidated" on constitutional grounds. Callen, 92 N.J. at 134 (citing Schmoll v. Creecy, 54 N.J. 194, 202-05 (1969) (extending the ability to recover under the wrongful death statute to illegitimate children in order to comport with the equal protection clause)); State v. De Santis, 65 N.J. 462, 472-73 (1974) (noting that, because the obscenity statute did not satisfy the constitutional standard set forth in Miller v. California, 413 U.S. 15 (1973), "we now judicially salvage [the statute] by incorporating the Miller requirements" rather than nullify the law and leave a void); see also State v. Lagares, 127 N.J. 20, 31-32 (1992) (saving the repeat-offender provision of the Comprehensive Drug Reform Act by requiring that guidelines be adopted and creating an avenue for judicial review).

The same principle underlies the concept of "judicial surgery." See Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983) ("When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' . . . [to] restore the statute to health."); State v. Natale, 184 N.J. 458, 485 (2005) ("When necessary, courts have engaged in 'judicial surgery' to save an enactment that otherwise would be constitutionally doomed.").

We add a look-back provision here to preserve the homicide statute because we have no doubt the Legislature would want the law to survive. See Natale, 184 N.J. at 485; Callen, 92 N.J. at 135.

Juvenile offenders sentenced under the statute may petition for a review of their sentence after having spent 20 years in jail. At the hearing on the petition, judges are to consider the Miller factors -- including factors that could not be fully considered decades earlier, like whether the defendant still fails to appreciate risks and consequences, and whether he has matured or been rehabilitated. See Miller, 567 U.S. at 477-78; Zuber, 227 N.J. at 451-52.

A defendant's behavior in prison since the time of the offense would shed light on those questions. Other factors, like the circumstances of the homicide offense, would likely remain unchanged. Both parties may also present additional evidence relevant to sentencing. See Zuber, 227 N.J. at 450. In particular, the trial court should consider evidence of any rehabilitative

efforts since the time a defendant was last sentenced. See State v. Randolph, 210 N.J. 330, 354-55 (2012).

As the Supreme Court acknowledged in Roper, "[a]n unacceptable likelihood exists that the" brutal nature of an offense can "overpower mitigating arguments based on youth." 543 U.S. at 573; see also Graham, 560 U.S. at 78. Courts must therefore consider the totality of the evidence.

After evaluating all the evidence, the trial court would have discretion to affirm or reduce a defendant's original base sentence within the statutory range, and to reduce the parole bar below the statutory limit to no less than 20 years.[6]

We ask trial courts to explain and make a thorough record of their findings to ensure fairness and facilitate review. See State v. Torres, 246 N.J. 246, 272 (2021) (requiring an "explanation for the overall fairness of a sentence"); State v. Fuentes, 217 N.J. 57, 70-74 (2014) (calling for "a qualitative analysis of the relevant sentencing factors on the record"); N.J.S.A.

[6] By the time of the hearing, juvenile offenders will be 35 to 38 years old. They will have had two decades to demonstrate how they have matured or reformed their ways. In light of the passage of time, courts will be in a position to assess those issues at the hearing and form a judgment as to whether the adult before them is or will be able to reenter society. As a result, we do not need to discuss further Zarate's argument that, before a lengthy period of parole ineligibility can be imposed, a juvenile must be found permanently incorrigible.

2C:43-2(e) (requiring a statement of reasons on the record); R. 3:21-4(h) (same).

We look to a number of sources to fix the look-back period at 20 years. First, the Legislature chose 20 years as the maximum sentence for a juvenile adjudicated of committing a homicide. N.J.S.A. 2A:4A-44(d)(1)(a). Second, the Criminal Sentencing and Disposition Commission recommended that juveniles sentenced as adults to prison terms for 30 years or more should "be entitled to apply to the court for resentencing after serving 20 years." N.J. Crim. Sent'g & Disposition Comm'n, Annual Report 29 (Nov. 2019). The Commission included representatives of the Governor and the Legislature, the Attorney General and the Public Defender, and the Parole Board and Department of Corrections, among others. Id. at ii. The Commission's recommendation was unanimous. Id. at 3.

Although we do not rely on proposed legislation that has not been enacted, the parties point to a bill that would codify the Commission's recommendation, which was pending at the time of oral argument. See A. 4372/S. 2591 (2020). As of now, the legislation has not been enacted into law.

We would have preferred to wait for the Legislature to act, but courts cannot decline to review a serious constitutional challenge on that basis. See Trop v. Dulles, 356 U.S. 86, 104 (1958) (noting that when a statute appears to

conflict with the Constitution, "we have no choice but to enforce the paramount commands of the Constitution" and cannot "shirk[]" that task); see also Comm. to Recall Menendez v. Wells, 204 N.J. 79, 95-96 (2010).

The Legislature is responsible for passing laws that fix the range of punishment for different crimes. State v. Cannon, 128 N.J. 546, 559-60 (1992); State v. Hampton, 61 N.J. 250, 273 (1972). The Judiciary, in turn, has long had the authority and responsibility to determine whether laws are constitutional. See Marbury v. Madison, 5 U.S. 137 (1803). In the context of sentencing laws, courts apply longstanding principles relating to the Eighth Amendment and the State Constitution and exercise independent judgment to assess constitutional claims. See Graham, 560 U.S. at 61; Gerald, 113 N.J. at 78, 89.

We have no choice but to apply those principles now in the face of an actual, live challenge. Despite good faith arguments to the contrary, we cannot elide a question because the Legislature may act in the future. The Legislature, as a matter of policy, still has the authority to select a shorter time frame for the look-back period.

The above approach does not threaten the juvenile waiver statute. In fact, it allows for the following scenario: a juvenile can be waived to adult court, prosecuted as an adult, and be sentenced for criminal homicide beyond

the maximum term that would apply in the Family Part.[7] Today's ruling simply allows for a review and possible reduction of a sentence after a juvenile offender has served two decades in prison. That step does not put in place a system of indeterminate sentencing.

VII.

Defendant Comer is therefore entitled to be resentenced again. He was resentenced in 2018, and the trial court weighed the Miller factors at that time. To be sure, the judge said he believed a 30-year period of parole ineligibility was "appropriate in this case." But in reducing Comer's sentence to 30 years in prison without the possibility of parole, the trial court accepted that the homicide statute called for that mandatory period of imprisonment.

Plus the 100-percent period of parole ineligibility the court imposed here -- a term of 30 years with a 30-year parole bar -- confirms that the court relied on N.J.S.A. 2C:11-3(b)(1). Other relevant provisions do not impose 100-percent bars. See, e.g., N.J.S.A. 2C:43-6(b) (authorizing courts to "fix a minimum term not to exceed one-half of the [base] term . . . during which the

[7] A prosecutor's decision to seek to waive a juvenile to adult court -- which the court reviews under a deferential standard and may deny "if it is clearly convinced that the prosecutor abused his discretion" in considering certain statutory factors, N.J.S.A. 2A:4A-26.1(c)(3) -- cannot be compared to a judge's review and determination of the particularized Miller factors at sentencing. See post at ___ (slip op. at 12-13).

defendant shall not be eligible for parole"); N.J.S.A. 2C:43-7.2(a) (directing that courts in certain cases "shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole").

Comer committed the offense in question in 2000 and has been in jail for more than 20 years. When he is resentenced on remand, the matter should be treated in the same way that a petition for review of a 30-year sentence with a 30-year parole bar would be addressed, after a juvenile offender had spent 20 years in jail. After assessing the relevant evidence, the trial court here has the authority to impose a period of parole ineligibility of less than 30 years, but not less than 20 years. We recognize the trial court already reduced Comer's sentence substantially in 2018 and do not express a view on the outcome of the hearing.

VIII.

Pursuant to this opinion, defendant Zarate is also entitled to a resentencing hearing. In determining an appropriate sentence, the trial court has the authority to impose a reduced sentence consistent with the range set forth in N.J.S.A. 2C:11-3(b)(1) and the principles outlined above. Because Zarate has not been in prison for 20 years, he is not eligible for a review of his sentence via a petition for a look-back; instead, he is to be sentenced anew with an appropriate application of the Miller factors.

The trial court misapplied the first Miller factor when it resentenced Zarate in 2017. As noted above, that factor invites consideration of the "hallmark features" of youth -- "among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Miller, 567 U.S. at 477. At Zarate's most recent resentencing, the trial court, in essence, mistakenly substituted "intelligence" for "maturity" in evaluating the factor.

The first factor reflects the fact that teenagers -- even intelligent ones -- are not yet as mature, or as fully developed in their way of thinking, as adults. On rare occasions, the State might be able to present expert psychiatric evidence as proof that a particular juvenile offender possessed unusual maturity beyond his years. If unrefuted, the first factor would not weigh in the defendant's favor. But a juvenile offender has no burden to produce evidence that his brain has not fully developed in order for the first factor to be considered in mitigation. See Jones, 141 S. Ct. at 1315-16 (describing the Miller factors as mitigating factors).

The trial court also relied on Zarate's "well-organized allocution," in which he quoted Nietzsche at one point. That type of comment alone does not establish proof of maturity within the meaning of the first factor. Nor would improved grades or educational accomplishments after a juvenile's offense

weigh against the first factor. They may instead reflect a person's maturation or rehabilitation over time.

We note as well that strategic decisions by counsel for both sides -- like the introduction of a stipulation or a statement to the police -- cannot be attributed to a juvenile or factor into the Miller analysis, absent evidence that the juvenile controlled counsel's choice. See Miller, 567 U.S. at 477-78 (fourth factor). Nor should a client's request that counsel file certain motions or make certain objections carry much, if any, weight. Such privileged conversations would seldom come to light in any event; here, Zarate himself volunteered the information.

Zarate also renews his claim that he was a victim of peer pressure from his older brother. See id. at 477 (third factor). The trial court rejected that argument, and its decision is supported by competent credible evidence in the record. See State v. Roth, 95 N.J. 334, 364-66 (1984); see also State v. Bolvito, 217 N.J. 221, 228 (2014) (sentencing court's determinations are reviewed for abuse of discretion). We see no reason to reconsider the court's ruling.

As in Comer's case, we recognize the trial court already reduced Zarate's sentence in 2017. In doing so, the judge appropriately considered the serious nature of the offense as well as Zarate's behavior in prison and record

of infractions, among other things.[8] We do not express a view on the outcome of the resentencing hearing.[9]

IX.

For all of those reasons, we reverse and remand the two matters for resentencing consistent with the principles outlined above.

JUSTICES LaVECCHIA, ALBIN, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion. JUSTICE SOLOMON filed an opinion concurring in part and dissenting in part, in which JUSTICES PATTERSON and FERNANDEZ-VINA join.

[8] The State submits that Zarate was charged more recently by a complaint-summons in April 2021.

[9] The judge who oversaw the trial and resentencing hearings is no longer serving on recall. Zarate's request that the matter be remanded to a different judge for resentencing is therefore moot.

State of New Jersey,

Plaintiff-Respondent,

v.

James Comer, a/k/a
James B. Comer and
James F. Comer

Defendant-Appellant.

State of New Jersey,

Plaintiff-Respondent,

v.

James C. Zarate, a/k/a
Navajas Zarate,

Defendant-Appellant.

JUSTICE SOLOMON, concurring in part, dissenting in part.

The majority today holds that the New Jersey Constitution requires a 20-year lookback period for juvenile offenders who were waived to adult court and tried and convicted as adults of homicide offenses. We acknowledge our colleagues' view that the New Jersey Constitution permits our intervention here. But we are not legislators imbued by our Constitution with such

authority. In our view, the majority today act "as legislators" instead of as judges. Gregg v. Georgia, 428 U.S. 153, 175 (1976). Thus, we respectfully dissent.

The majority asserts that it is required to act by our Constitution and landmark juvenile sentencing cases from both this Court and the United States Supreme Court. See Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); State v. Zuber, 227 N.J. 422 (2017). The cited cases hold that, for the purpose of sentencing, the Constitution requires courts to treat juveniles differently and to consider certain factors before sentencing them to life without parole or its functional equivalent. We believe that our current sentencing scheme fulfils that constitutional mandate. Thus, it is not our prerogative to impose an additional restriction on juvenile sentencing.

In our view, a 30-year parole bar for juveniles tried as adults and convicted of homicide conforms with contemporary standards of decency, is not grossly disproportionate as to homicide offenses, and does not go beyond what is necessary to achieve legitimate penological objectives.

Accordingly, we believe that the majority's imposition of a 20-year lookback period for homicide offenses is a subjective policy decision rather than one that is constitutionally mandated. As such, it must be left to the Legislature, which could have considered all of the factors the majority has,

and some it has not. Instead, the majority joins a small minority of states with lookback periods imposed by judicial fiat rather than by statute.

I.

We agree with the majority's recitation of the facts and procedural history of the two cases consolidated in this appeal. We thus begin by reiterating the bedrock principles that limit our role as a branch of government.

"It is a constitutional axiom that each branch of government is distinct and is the repository of the powers which are unique to it; the members or representatives of one branch cannot arrogate powers of another branch." Knight v. City of Margate, 86 N.J. 374, 388 (1981). "[T]he taking of power is . . . prone to abuse and therefore warrants an especially careful scrutiny." Commc'ns Workers of Am. v. Florio, 130 N.J. 439, 457 (1992). The doctrine of separation of powers thus "contemplates that each branch of government will exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch." Knight, 86 N.J. at 388. Like the other branches, we are "counseled and restrained by the constitution not to seek dominance or hegemony over the other branches." Ibid.

"Accordingly, the exercise of the judicial power to invalidate a legislative act 'has always been exercised with extreme self-restraint, and with a deep awareness that the challenged enactment represents the considered

action of a body composed of popularly elected representatives.'" State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 526 (1999) (quoting N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972)). Consistent with those limitations, we will not invalidate any portion of a statute "unless its repugnancy to the Constitution is clear beyond a reasonable doubt." Ibid. (quoting Harvey v. Essex Cnty. Bd. of Freeholders, 30 N.J. 381, 388 (1959)). There are times, however, when "the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government." Robinson v. Cahill, 69 N.J. 133, 154 (1975). This is not one of those times.

II.

In this appeal, the Court considers whether a juvenile adjudicated as an adult, convicted of murder, and sentenced to a term of imprisonment of 30 years before being eligible for parole pursuant to a statute violates the ban on cruel and unusual punishment embodied in the Eighth Amendment of the United States Constitution and Article I, Paragraph 12 of the New Jersey Constitution.

The ban on excessive punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." Zuber, 227 N.J. at 437 (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005)). "'The test to determine

whether a punishment is cruel and unusual . . . is generally the same' under both the Federal and State Constitutions," and the language of both is virtually identical. Id. at 438 (omission in original) (quoting State v. Ramseur, 106 N.J. 123, 169 (1987)). Both require a three-part inquiry:

> First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?
>
> [Ibid. (quoting Ramseur, 106 N.J. at 169).]

In assessing the first prong, "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Graham, 560 U.S. at 62 (alteration and internal quotation marks omitted) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)). Under the third prong, courts must assess whether "[a] sentence lack[s] any legitimate penological justification." Id. at 71. If so, such a sentence "is by its nature disproportionate to the offense." Ibid.

However, as to the second prong, the United States Supreme Court has adopted a different analysis for proportionality in the juvenile sentencing context, adopting the categorical approach from its death penalty cases. See id. at 61-62. That approach first looks to "'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to

determine whether there is a national consensus against the sentencing practice at issue." Id. at 61 (quoting Roper, 543 U.S. at 563). Then, "guided by 'the standards elaborated by controlling precedents and by [our] own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,'" we "must determine in the exercise of [our] own independent judgment whether the punishment in question violates the Constitution." Ibid. (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)). The Court again applied that approach in Miller, 567 U.S. at 479.

The approach to assessing juvenile sentences under the Eighth Amendment adopted in Graham and Miller was premised on two guiding principles. The first is "that children are constitutionally different from adults for purposes of sentencing." Miller, 567 U.S. at 471. The second is that the imposition of the "harshest possible penalty," a sentence of life without parole, precludes consideration of those constitutionally significant differences. See id. at 477-79.

We extended Miller's holding to sentences that are the "practical equivalent of life without parole" because "[t]he proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence." Zuber, 227 N.J. at 429. In Zuber, we observed "that the Constitution 'prohibit[s] States from making the judgment at the outset that

[a juvenile] never will be fit to reenter society.'" Id. at 451 (alterations in original) (quoting Graham, 560 U.S. at 76). We observed that such a judgment "would raise serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date." Id. at 452.

Notwithstanding this conclusion reached in Miller, however, "the requirements of the Eighth Amendment" and thus Article I, Paragraph 12 of the New Jersey Constitution "must be applied with an awareness of the limited role to be played by the courts." Gregg, 428 U.S. at 174. This is because "while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." Id. at 174-75; see also Miller, 567 U.S. at 495 (Roberts, C.J., dissenting) ("As judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty.").

III.

A.

1.

As to the first part of our inquiry -- whether a 30-year parole bar for juveniles convicted of murder conforms with contemporary standards of decency -- we observe that Graham, Miller, and their progeny all take pains to

specify that the constitutional infirmity lies in sentencing juveniles to such lengthy terms of parole ineligibility that they will likely never truly receive the opportunity for parole. Such a sentence "den[ies] the defendant the right to reenter the community." Graham, 560 U.S. at 74. Indeed, sentencing a teenager to six or seven decades of parole ineligibility would "mak[e] youth (and all that accompanies it) irrelevant." Miller, 567 U.S. at 479. Today, the majority holds that 20 years of parole ineligibility is the constitutional limit, taking Miller farther than its reasoning warrants and farther than Article I, Paragraph 12 of the New Jersey Constitution requires.

We joined the majority in Zuber in part because adhering to the mere label of "life" rather than the actual term of years would "elevate form over substance." Zuber, 227 N.J. at 447. Before our decision in Zuber, Comer's sentence was a minimum of 68 years and 3 months before he would be eligible for parole. Zarate's sentence was a minimum of 63 years and 9 months before he would be eligible. Comer would have been about 85 and Zarate about 77 before becoming eligible for parole. Before the Court on this appeal stands Comer, who would serve 30 years before becoming eligible for parole, and Zarate, who would serve 42 1/2 years before becoming eligible. Thus, Comer would become eligible at 47 years of age, and Zarate at 56.

Defendants' sentences were not the functional equivalent of life without parole post-Zuber. Under those sentences, there existed the possibility of rehabilitation and reentry into society for both of them. See Rummel v. Estelle, 445 U.S. 263, 280-81 (1980) (recognizing that the opportunity for "parole, however slim, serves to distinguish" a sentence from one without the possibility of parole). A minimum of 30 years before parole ineligibility is not a "denial of hope," it does not mean "that good behavior and character improvement are immaterial," and it does not mean whatever the future might hold in store for the mind and spirit of [the juvenile offender], he will remain in prison for the rest of his days." Graham, 560 U.S. at 70 (quoting Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989)). Respect for the Legislature's authority under New Jersey's Constitution should have ended the discussion there.

A reviewing court's role is to ensure that a statutory scheme does not eliminate a judge's discretion by mandating a penalty that will subject a juvenile offender to such a lengthy term of years that his youth is irrelevant. That was not the case here. "The power to declare what shall be deemed a crime and to fix the maximum and minimum term of imprisonment for such a crime is committed by the people of the State to the legislative and not to the

judicial branch of government." State v. Hampton, 61 N.J. 250, 273 (1972); see also State v. Des Marets, 92 N.J. 62, 80-81 (1983).

2.

Although many states have imposed lookback periods for juvenile offenders -- some that require review even earlier than the 20-year mark imposed by the majority -- nearly all have done so through legislation. See, e.g., W. Va. Code § 61-11-23(b) (parole eligibility after 15 years); N.D. Cent. Code § 12.1-32-13.1 (parole eligibility or sentence reduction after 20 years). Some have retained parole bars longer than 20 years. See Del. Code Ann. tit. 11, § 4204A(d)(1) to (2) (parole eligibility after 30 years for first-degree homicide); Wyo. Stat. Ann. § 6-10-301(c) (parole eligibility after 25 years for first-degree homicide); Mass. Gen. Laws Ch. 279, § 24 (parole eligibility after 30 years for first-degree murder committed "with extreme atrocity or cruelty," and after 25 to 30 years for first-degree murder committed with "deliberately premeditated malice aforethought"); Ark. Code Ann. § 16-93-621 (parole eligibility after 30 years for capital murder). Some states offer ranges allowing for periods of parole ineligibility longer than 20 years. See Cal. Penal Code § 3051(b) (parole eligibility for juveniles after 15, 20, or 25 years, depending on the length of the original sentence); Fla. Stat. § 921.1402 (same).

The majority here follows only two states, whose high courts considered the deprivation of judicial discretion with respect to mandatory sentences for non-homicide crimes and eliminated the mandatory minimum periods of parole ineligibility.[1] We repeat, neither of those courts were confronted with Zarate's depraved homicide of a teenage girl or Comer's series of four armed robberies, one of which led to the death of the victim. See State v. Lyle, 854 N.W.2d 378, 380 (Iowa 2014) (considering a mandatory parole ineligibility period of 7 years for a conviction of robbery); State v. Houston-Sconiers, 391 P.3d 409, 414 (Wash. 2017) (considering mandatory parole ineligibility periods of 31 and 26 years for robbery convictions subject to firearm enhancements); see also State v. Shanahan, 445 P.3d 152, 160 (Idaho 2019) (declining to follow Houston-Sconiers because it did not "involve juveniles convicted of homicide"), cert. denied, 140 S. Ct. 545 (2019). To date, no other state supreme court has followed either of those cases.

The majority also points to New Jersey's juvenile sentencing scheme in our Code of Juvenile Justice, N.J.S.A. 2A:4A-44(d)(1)(a), to suggest that the Legislature believes that a juvenile convicted of murder should not serve more

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[1] Both the Iowa and Washington state constitutions contain a prohibition on cruel and unusual punishments similar to our own and that of the Federal Constitution. See Iowa Const. art. I, § 17; Wash. Const. art. I, § 14.

than 20 years. In our view, this observation is plainly inconsistent with the way the waiver statute, N.J.S.A. 2A:4A-26.1, operates. Taken together, these statutes indicate that the Legislature believes some juveniles convicted of murder should not serve more than 20 years in prison. The distinction does not "disappear," as the majority suggests, when a juvenile is waived up to adult court. The same is true of felony murder. See N.J.S.A. 2A:4A-44(d)(1)(b). In fact, the waiver statute explicitly requires a waiver motion before the Family Part to consider "[t]he nature and circumstances of the offense charged," N.J.S.A. 2A:4A-26.1(c)(3)(a); the "[d]egree of the juvenile's culpability," id. at (c)(3)(c); and the "[a]ge and maturity of the juvenile," id. at (c)(3)(d), before applying the waiver statute. In purported support of its position, the majority observes that, under the existing statutory scheme, a juvenile may be waived and sentenced to more than the 20-year maximum sentence governing the Family Part. But that reasoning ignores the legislative judgment that certain juvenile offenders are more dangerous than others, based upon the circumstances of the offense and culpability and age and maturity of the offender, and therefore should be subject to the 30-year parole bar after waiver. Indeed, one of the hallmarks of waiver is the application of the sentencing scheme established in the Code of Criminal, rather than Juvenile, Justice.

And the recently amended waiver statute sets forth clearly the criteria for separating out those juveniles whom the Legislature intends should serve less time. Those criteria account for the Miller factors. Compare Miller, 567 U.S. at 477-78, with N.J.S.A. 2A:4A-26.1(c)(3) (allowing a court to deny a motion to waive a juvenile into adult court "if it is clearly convinced that the prosecutor abused his discretion in considering," among other factors, the "[d]egree of the juvenile's culpability," his "[a]ge and maturity," his "[d]egree of criminal sophistication," and "[e]vidence of mental health concerns, substance abuse, or emotional instability"). By thus making clear what must be considered before a juvenile can be waived, the Legislature has also spoken clearly regarding juvenile offenders who are subject to waiver, such as those who commit murder in a sufficiently heinous manner. "The public interest involved, prevention of violent crime, is most important -- some would say second to none -- and the legislative responsibility and power paramount." Des Marets, 92 N.J. at 81.

We recognize the growing legislative trend of establishing lookback periods for juvenile offenders, but we do not see how that legislative trend establishes a national standard that requires the majority's judicial remedy. The majority here denies our Legislature its prerogative to follow any of those states that allow a 25- or 30-year parole bar for first-degree murder, that

impose a sliding scale whose maximum goes beyond 20 years of parole ineligibility, or that allow for the imposition of more than 20 years of parole ineligibility for juveniles convicted of especially heinous offenses -- like Zarate -- or of multiple serious offenses -- like Comer.

We fail to see how contemporary standards of decency require a lower parole bar imposed by judicial fiat. Accordingly, the Legislature should be the one to decide, but the majority has done so in its place. That is a bridge too far for us. See Florio, 130 N.J. at 457.

B.

Under the second prong of the Eighth Amendment analysis -- proportionality -- it is true that Miller's pronouncements are not "crime-specific." 567 U.S. at 473. But that does not mean that the offense for which a defendant has been convicted falls out of the picture entirely. The majority acknowledges that murder is a serious offense but makes no effort to balance the gravity and depravity of murder with the mitigating qualities of youth. See ante at ___ (slip op. at 45) (citing State v. Serrone, 95 N.J. 23, 27 (1983)). The majority summarily concludes that, like a sentence of life without parole, a 30-year parole bar denies a court the chance to assess a juvenile offender's youth. We reiterate that we fail to see how a 30-year bar makes youth irrelevant and a 20-year bar does not. Simply put, a 30-year bar is constitutional because it

does not require imposition of a sentence of life without parole or its functional equivalent. E.g., Ouk v. State, 847 N.W.2d 698, 701 (Minn. 2014). Clearly, there is some level of uncertainty involved in making such judgments, but sufficiently serious crimes warrant proportionately serious punishments, even when committed by juveniles. Accordingly, these policy decisions are for the Legislature.

Indeed, it is the Legislature's role to determine the appropriate penalties for those -- and all -- criminal offenses. Hampton, 61 N.J. at 273. Likewise, "[c]riminal punishment can have different goals, and choosing among them is within [the] [L]egislature's discretion." Graham, 560 U.S. at 71. The Constitution limits the Legislature from mandating a sentence of life without parole or its functional equivalent. Below that, we think that both the Federal Constitution and our own defer to legislative judgment. See Graham, 560 U.S. at 75 (noting that the States should "explore the means and mechanisms for compliance" with the Eighth Amendment). Indeed, the majority today does what the Miller Court did not. Miller "d[id] not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process . . . ." 567 U.S. at 483. We would simply have required the sentencing court to adhere to that process.

C.

Considering whether legitimate penological objectives are served by the sentences imposed upon Zarate and Comer -- the third prong of the constitutional analysis -- the differences between life without parole and a minimum parole ineligibility period of 30 years are clear when viewed in the context of the policy objectives of sentencing. See State v. Taylor G., 110 A.3d 338, 346 (Conn. 2015) (observing that mandatory sentences that do not result in life without parole "do not implicate the factors deemed unacceptable in Roper, Graham and Miller when those penalties are imposed on juveniles, namely, the futility of rehabilitation and the permanent deprivation of all hope to become a productive member of society"). But retribution and deterrence -- like the gravity of homicide offenses -- are not irrelevant when sentencing juvenile offenders; nor is incapacitation.

The majority cites scientific literature that explains that most juveniles will desist from crime. They cite precedents and common sense in observing that juveniles are generally less culpable. These are considerations that the Legislature should balance -- and has. See A. 4372/S. 2591 (2020) (providing that our courts shall resentence certain juveniles convicted as adults and take into account "the role of the attendant characteristics of youth in the offense,

including impulsivity, risk-taking behavior, immaturity, and susceptibility to peer pressure").

When the Supreme Court concluded that the Eighth Amendment "prohibit[s] States from making the judgment at the outset that those offenders never will be fit to reenter society," ante at ___ (slip op. at 29) (quoting Graham, 560 U.S. at 76), it was addressing the "irrevocable judgment" that "den[ies] the defendant the right to reenter the community," Graham, 560 U.S. at 74; see also State in Interest of C.K., 233 N.J. 44, 75-76 (2018) (holding a lifetime registration requirement for certain juvenile sex offenders unconstitutional in part because "keeping on the sex-offender registry those juveniles who have completed their rehabilitation, not reoffended, and who can prove after a [15]-year look-back period that they are not likely to pose a societal threat").

A 30-year parole bar does not forever deny the defendant the right to reenter society. It is not an irrevocable judgment. It does not render moot all a juvenile offender's efforts to rehabilitate himself or to prove to society that he is no longer likely to pose a threat. See People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (holding a sentence of 110 years of parole ineligibility for a juvenile offender convicted of attempted murder unconstitutional because his

parole eligibility date "falls outside [his] natural life expectancy"). But it is the product of a complex legislative decision, one that we owe deference to.

Yet the majority decides that 30 years of parole ineligibility will not advance the goals of rehabilitation. Ante at ___ (slip op. at 49). But making that decision is not our constitutional role. See In re J.S., 223 N.J. 54, 78 (2015) ("Our role . . . [is] not to 'pass judgment on the wisdom of a law or render an opinion on whether it represents sound social policy.'") (quoting Caviglia v. Royal Tours of Am., 178 N.J. 460, 476 (2004))).

Most juvenile offenders will desist. Some will not. Most juveniles are less culpable. Some are not. Some will be rehabilitated faster than others, and some will never be rehabilitated. The Legislature must consider all offenders and all offenses when it enacts a statute, as well as the requirement to treat victims of crimes "with fairness, compassion and respect." N.J. Const. art. I, ¶ 22. As difficult as it is for judges to impose sentences of incarceration, it is even more difficult to decide what penal laws will govern an entire society, and "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." State v. A.T.C., 239 N.J. 450, 466 (2019) (quoting State v. Buckner, 223 N.J. 1, 14 (2015)).

IV.

As for Zarate, we join in the portion of the majority's decision concluding that the sentencing court misapplied the first Miller factor and remanding for resentencing. We agree that in Zarate's case there must be a more substantial showing that less weight should be given to his immaturity, one of the "hallmark features" of youth. Miller, 567 N.J. at 477. We also agree with the majority that competent credible evidence supported the trial court's rejection of Zarate's renewed argument that he was the victim of his older brother's peer pressure. See ante at ___ (slip op. at 59-60). Beyond those points of concurrence, we respectfully dissent.

We dissent in full as to Comer. In that case, we would affirm Comer's sentence and do nothing more.

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New Jersey

P.O. Box 32159
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Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy

973-854-1714
ashalom@aclu-nj.org

December 13, 2021

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-12-21, *State v. F.E.D.* (086187),
Appellate Division Docket No. A-2554-20

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

Table of Contents

Preliminary Statement

Amicus ACLU-NJ submits this letter brief in support of Petitioner F.E.D. While *amicus* supports the arguments ably put forth by F.E.D. in his supplemental brief, *amicus* does not repeat all of the arguments here, but focuses instead on two narrow issues that are likely to recur in other applications for compassionate release.

Acknowledging that New Jersey incarcerates too many infirm people, at great costs – both personal and financial – the Legislature passed, and the Governor signed, a compassionate release law. The law sought to ensure that prisons did not transform into nursing homes, providing around-the-clock care for the seriously ill, except where security concerns required them to do so.

The law requires, as a threshold matter, the incarcerated person to obtain a certificate of eligibility from Department of Corrections (DOC) doctors. The prison doctors provide the certificate if the person has a terminal diagnosis or, as applicable here, suffers from a permanent physical incapacity. Thereafter, the person may seek compassionate release in the Law Division. The court may grant release where the incarcerated person proves by clear and convincing evidence that that are so enfeebled "as to be permanently physically incapable of committing a crime if released." Finally, the court must be convinced that releasing the person on agreed upon parole terms would not pose a threat to public safety.

Faced with a case testing that law, the Appellate Division read several terms of the statute in a way that stripped the statute of its very purpose: compassion. (Point I). Specifically, the panel replaced the medical judgment of the DOC and determined that F.E.D. was not permanently physically incapacitated enough because there were some activities of daily living (ADLs) that he could, arguably, perform. This was error both because the DOC's medical judgment was entitled to deference and because the inability to perform several ADLs renders a person permanently physically incapacitated, under an ordinary understanding of the term. (Point I, A). And, in *dicta*, the panel provided an interpretation of the two public safety provisions of the law that would only allow for release where a court was certain that a person could not commit a crime. Insofar as such an assurance could never be given, the interpretation renders the law useless. The Legislature could not have intended such a result. (Point I, B).

To effect the law's purpose – to provide for compassionate release of people ailing in our prisons when it can be done safely – the Court must reject the limitations the Appellate Division read into the statute.

Statement of Facts and Procedural History

Amicus ACLU-NJ accepts the statement of facts and procedural history contained in Defendant F.E.D.'s supplemental brief filed before this Court.

Argument

I. The Appellate Division's cramped reading of the compassionate release statute strips the statute of its legislative purpose.

On October 19, 2020, Governor Murphy signed into law A2370, a statute that allows for compassionate release. N.J.S.A. 30:4-123.51e. The law calls on the Commissioner of the DOC to establish a process for incarcerated people to obtain medical diagnoses from two doctors to determine whether they are eligible for compassionate release. N.J.S.A. 30:4-123.51e(b). When those doctors determine that a person suffers from a permanent physical incapacity ("a medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing" N.J.S.A. 30:4-123.51e(l)), the DOC is commanded to issue a certificate of eligibility for compassionate release; thereafter the incarcerated person may petition a trial court for compassionate release. N.J.S.A. 30:4-123.51e(d)(2).

In evaluating petitions for compassionate release, trial courts look for clear and convincing evidence that the petitioner is so permanently physical incapacitated[1] "as to be permanently physically incapable of committing a crime if

[1] The statute also allows for compassionate release of those people facing terminal diagnoses – that is, a prognosis that a person has six months or less to live – but

released. . . ." N.J.S.A. 30:4-123.51e(f)(1). Additionally, the court must find, by the same standard, that releasing the petitioner under conditions of parole "would not pose a threat to public safety." *Id.*

This procedure allows extremely sick people – those who cannot perform important activities of daily living – an opportunity to get out of prison, provided their illness has sufficiently enfeebled them and their release can be safely accomplished. Instead of applying the statute to the facts of F.E.D.'s case, the Appellate Division read into the statute additional language that creates impossible burdens for petitioners to meet.

A. The Appellate Division's narrow reading of "permanent physical incapacity" would render virtually no one eligible for release.

The Appellate Division's hinged its resolution of the case on a "threshold question: whether F.E.D. suffers from a permanent physical incapacity." *State v. F.E.D.*, 469 N.J. Super. 45, 57 (App. Div. 2021).[2] The panel acknowledged that it owed some deference to the DOC's interpretation of the statute, as it was the agency charged with apply the law. *Id.* at 59. Still, the court held that the certificate of eligibility issued by the DOC was invalid because the physicians did not find

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that provision is not at issue in this case. N.J.S.A. 30:4-123.51e(f)(1); N.J.S.A. 30:4-123.51e (l).

[2] P. Cert refers to the Petition for Certification;
SBr refers to the State's Appellate Division brief;
DSuppBr refers to F.E.D.'s Supplemental brief filed with this Court.

that F.E.D. was "unable to perform activities of basic daily living[,]" as required by law. *Id.* at 64.

The Legislature made explicit delegations in the statute: the DOC is tasked with making the medical determinations and the courts are required to review them for arbitrariness and then independently make public safety determinations. Rather than engaging in deferential review, the trial court and Appellate Division conducted independent medical analysis to determine that F.E.D. was not permanently physically disabled. The independent assessment employed the wrong standard and reached the wrong conclusions.

The Appellate Division took issue with two components of the certificate: First, that the treating physicians did not make explicit findings about F.E.D.'s ability to engage in ADLs, though the medical director did. *Id*. at 65. Second, that the DOC found that F.E.D. was unable to perform some – rather than all – ADLs. *Id.* at 64-65. *Amicus* focuses here on the second rationale since the first, if correction were necessary, presumably, could be remedied by a remand in which the designated doctors were more explicit.[3]

All parties and the Appellate Division seem to agree (*Id.* at 59, P. Cert. at 5,

[3] It is unnecessary here to determine whether the Court should hold F.E.D. responsible for the DOC's failure to abide by the exact dictates of the statute. But fairness likely precludes rejecting (with prejudice) an incarcerated person's petition because of the DOC's error. *See also* DSuppBr at 39-40 (explaining why DOC's process in this case satisfies statutory requirements).

SBr at 25) that the ADLs at issue are the activities of *basic* daily living – like bathing, dressing, toileting, locomotion, transfers, eating, and mobility – rather than activities like shopping, house cleaning, food preparation, and laundry. The question, then, is how many basic ADLs a person must be unable to perform to qualify as permanently physically incapacitated. The Appellate Division interpreted the statute to require a person to be unable to perform *all* ADLs. Such a reading limits the reach of the statute in ways the Legislature could not have intended.

Because it could not determine the exact line the Legislature drew, the Appellate Division determined that "[b]y stating that a person is 'unable to perform activities of basic daily living,' the Legislature meant 'unable to perform any activity of basic daily living.'" Slip. Op. at 62. It reasoned that "If the Legislature intended to refer to less than all activities, it could have done so." *Id.* (citing N.J.S.A. 17:30B-2 (setting the number at two) and N.J.A.C. 12:15-1.1A (setting the number at three)). But the converse is also true: had the Legislature intended to refer to *all* activities, it could have done so. It would have been just as simple for the Legislature to add the word "any" or "all" as it would have been for them to designate a number of ADLs. In interpreting statutes, courts "must be careful not to 'rewrite a statute or add language that the Legislature omitted.'" *State v. Twiggs*, 233 N.J. 513, 533 (2018) (quoting *State v. Munafo*, 222 N.J. 480, 488 (2015)). The

Appellate Division not only added language, but it also did so in a way that undermined the very purpose of the statute.[4]

There would exist no need for courts to perform the public safety analyses required by statute if only people who could perform no ADLs were even eligible for consideration under the statute. After all, if certificates of eligibility required a showing that a person could not bathe, dress, toilet, locomote, eat, move, *and* transfer without assistance, it is hard to imagine how that person could nonetheless pose a risk to public safety. The Legislature would not have set a procedure to allow courts to consider public safety if virtually no one would even qualify for consideration.

But even if either reading were plausible, the Court must defer to the DOC's interpretation: an appellate court must accord an administrative agency deference in its exercise of statutorily delegated responsibility. *In re Atty Gen. Law Enforcement Directives Nos. 2020-5 and 2020-6*, 246 N.J. 462, 489 (2021) (citations omitted). The compassionate release statute assigns the DOC responsibility to determine whether an incarcerated person meets the medical prerequisites to proceed with a petition. N.J.S.A. 30:4-123.51e(b), (d)(2), (l). As a result, the DOC's medical determination – that F.E.D. qualifies as permanently

[4] *Amicus* adopts F.E.D.'s persuasive explanation of why the Governor's press release, including quotes from the sponsors, serves as a persuasive source of legislative intent. DSuppBr at 23-24, n. 10.

physically incapacitated – is entitled to deference; absent a showing of arbitrariness or capriciousness, courts should not disturb the DOC's determination of eligibility.

B. The panel's erroneous interpretation of the public safety provision of the law would limit its application to almost no one.

The Appellate Division's holding was limited to eligibility; once the panel determined that F.E.D.'s certificate should not have issued, it did not need to go any further. *F.E.D.*, 469 N.J. Super. at 66. Acknowledging that any further analysis would amount to dicta, the court nonetheless offered some "limited observations." *Id.* None of those observations resolved the "knotty issues" that statute raised. *Id*. at 68. Still, the court's discussion of one issue raises serious concerns.

After determining that a person is physically incapable of committing a new crime the court must determine whether release on parole conditions "would . . . pose a threat to public safety." N.J.S.A. 30:4-123.51e(f)(1). The trial court held, and the Appellate Division observed, that the statute does not ask whether there is a "reasonable" likelihood of a threat to public safety. *Id.* In contrast, the parole law asks whether there exists "a reasonable expectation" that someone will violate parole (N.J.S.A. 30:4-123.53(a)) and the Criminal Justice Reform Act requires release where conditions will "reasonably assure" public safety. N.J.S.A. 2A:162-19. Because the statute did not include the word "reasonable," the trial court interpreted it strictly.

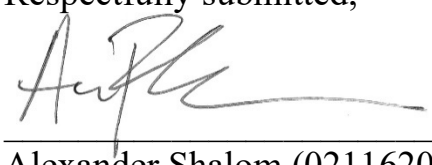
The absence of the word "reasonable" does not provide license for the courts to make unreasonable determinations. No court could *ever* hold that a threat to public safety is an absolute impossibility. Nowhere else in our system do we demand a complete assurance that no risk exists. *See*, *e.g.*, *State v. Lopez-Carrera*, 245 N.J. 596, 614 (2021) (explaining that the CJRA "is painstakingly designed to measure and manage the level of risk each defendant presents" not eliminate the risk altogether). Nor could we. Risk can never be eliminated in its entirety, so a law that demanded total assurance that no risk existed could not be effectuated.

In determining whether a person "would . . . pose a threat to public safety" (N.J.S.A. 30:4-123.51e(f)(1)) if released, courts should do what they always do in making that determination – decide whether the risk posed can be tolerated. This is not to say that courts must have the same risk tolerance is all contexts: a person jailed pretrial presumably has different liberty interests than a person seeking parole (or compassionate release) or a person seeking to avoid civil commitment under the SVPA (N.J.S.A. 30:4–27.24 to 27.38), which yields varied risk tolerance. But the absence of the word reasonable does not require courts to deny petitions whenever there exists *any* risk of recidivism. The Legislature would not pass a law with an intended reach of no people.

Conclusion

Releasing people from prison early – even those people who are so debilitated as to need around-the-clock care – requires thoughtful consideration. These questions are complex and judges hearing Petitions for release must engage in fact-sensitive analyses. But, recognizing this reality, the Court should not interpret the compassionate release statute in a way that precludes meaningful consideration of petitions. The Court should reverse the Appellate Division's eligibility holding and remand for appropriate consideration of the public safety factors.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, NJ 07102
(973) 854-1714
ashalom@aclu-nj.org

STATE OF NEW JERSEY, Plaintiff-Respondent, v. F.E.D., Defendant-Petitioner.	SUPREME COURT OF NEW JERSEY Docket No. 086187 Criminal Action On Certification From: Superior Court of New Jersey, Appellate Division Sat Below: Mitchel E. Ostrer, P.J.A.D. Allison E. Accurso, J.A.D. Catherine I. Enright, J.A.D.

BRIEF OF PROPOSED *AMICUS CURIAE* ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

Anne M. Collart (111702014)
Lawrence S. Lustberg (023131983)
Gibbons P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of this State for, among other purposes, to "protect and ensure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitution; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good[.]" *ACDL-NJ By-Laws*, Article II(a), http://www.acdlnj.org/about/bylaws. The ACDL-NJ is comprised of over 500 members of the criminal defense bar of this State, including attorneys in private practice and public defenders.

Over the years, the ACDL-NJ has participated as *amicus curiae* in numerous cases in this Court and in the Appellate Division. *See, e.g., State v. Lodzinski*, 246 N.J. 331 (2021); *State ex rel. A.A.*, 240 N.J. 341 (2020); *State v. L.H.*, 239 N.J. 22 (2019); *State v. Cassidy*, 235 N.J. 482 (2018); *State v. Lunsford*, 226 N.J. 129 (2016); *In re State Grand Jury Investigation*, 200 N.J. 481 (2009); *State v. Osorio*, 199 N.J. 486 (2009); *Gannett Satellite Info. Network, LLC v. Twp. of Neptune*, 467 N.J. Super. 385 (App. Div. 2021); *State v. Martinez*, 461 N.J. Super. 249 (App. Div. 2019); *State v. Jackson*, 460 N.J. Super. 258 (App. Div. 2019), *aff'd o.b.*, 241 N.J. 547 (2020); *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). Indeed, on various occasions, the ACDL-NJ has affirmatively been requested to file *amicus* briefs on matters of

importance to the courts. *See, e.g.*, *State v. Hernandez*, 225 N.J. 451 (2016); *State v. Scoles*, 214 N.J. 236 (2013); *State v. Bishop*, 429 N.J. Super. 533 (App. Div. 2013); *State v. Cohen*, 431 N.J. Super. 256 (App. Div. 2009).

Amicus seeks to participate in this matter in order to place New Jersey's compassionate release initiative in the context of other similar efforts across the United States to address the burgeoning fiscal and prison health crises of elderly prisoners in an era of mass incarceration. *Amicus* thus seeks to "assure that all recesses of the problem will be earnestly explored." *See Whelan v. N.J. Power & Light Co.*, 45 N.J. 237, 244 (1965). *Amicus*'s participation is particularly appropriate because this is a case interpreting new legislation for the first time with potentially "broad implications," *Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 17 (1976), in which *Amicus*'s "participation will assist in the resolution of an issue of public importance." *R.* 1:13-9.

PRELIMINARY STATEMENT

The issue before the Court is whether the Appellate Division properly construed New Jersey's newly-enacted compassionate release statute, N.J.S.A. 30:4-123.51e, which replaced the State's virtually unused medical parole scheme, N.J.S.A. 30:4-123.51c. The Appellate Division held that statutory language requiring a person to be "unable to perform activities of basic daily living" required that the individual must be completely unable to perform *any* activities of basic daily living. In so holding, the panel

interpreted the statute so narrowly as to effectively preclude its application, significantly diminishing the availability of release for inmates with significant health issues.

That ruling undermines the clear purpose of our State's compassionate release statute and threatens to eviscerate the legislative action taken to expand medical parole to a greater number of incarcerated individuals, including those convicted of murder and other serious offenses. Moreover, the Appellate Division decision ignores the context in which New Jersey's compassionate release framework arises. In an era of mass incarceration with a rapidly aging prison population that results in significant costs to taxpayers, nearly all states have enacted some form of compassionate release. But New Jersey's scheme is unique in two ways. First, it adopts nearly every recommendation by the relevant experts and industry specialists as to the way in which the use of compassionate release can and should be expanded. And second, and despite a structure and history that makes clear the legislative intent that it be applied broadly, it has been interpreted by the Appellate Division to be more restrictive than in any other state, none of which require that an inmate be unable to perform *any* activity of daily living.

The Appellate Division's decision also theorized about the requirements that the inmate be so "incapacitated by the permanent physical incapacity so as to be permanently physically incapable of committing a crime if released" and that the conditions of release "would not pose a threat to public safety." In doing so,

the panel hypothesized that persons with severe dementia or paralysis *might* qualify for release, but questioned even that possibility, describing how someone with quadriplegia might enlist another to commit a crime on his or her behalf. In analyzing this factor, however, the Appellate Division failed to require, or for its part, to give any consideration to the condition of the inmate before the court at the time of the petition, including the inmate's rehabilitative efforts and advanced age, both of which strongly indicate a lower risk assessment. This aspect of the Appellate Division holding, too, threatens the efficacy of New Jersey's compassionate release program, and portends a program that is salutary only on paper.

For these reasons, ACDL-NJ respectfully submits this brief a*micus curiae* to urge the Court to reverse the Appellate Division decision and interpret the statute consistent with both its plain language and its intent, neither of which square with a requirement that an inmate be unable to perform any activity of daily living. The ACDL-NJ also requests that this Court to make clear that, contrary to the Appellate Division's "observations" regarding the required public safety assessment, a trial court considering a compassionate release application must meaningfully consider the inmate as he or she stands before the court, including evidence of rehabilitation and advanced age.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus adopts the facts and procedural history described in Defendant's Supplemental Brief.[2] Briefly stated, F.E.D. - one of the first to seek relief under New Jersey's compassionate release statute - is a 73 year old inmate with significant and life-threatening cardiac problems, including heart failure, which his treating cardiologist described as leaving him one step away from being hospitalized on life-support as he awaits a heart transplant or similar intervention. 1T49-20 to 50-11; Dsb4, 6. According to the two Department of Corrections ("DOC") physicians who evaluated him for purposes of this inquiry, he lives in the infirmary unit as a result of his health condition and resulting severely diminished ability to perform activities of daily living ("ADLs") without assistance. Da4-6; Db7. He is unable to ambulate to any location outside the infirmary to which he must be transported via wheelchair, and cannot bathe himself or use the bathroom unaided. 1T65-20 to 67-19; Dsb7. When released, F.E.D. will require 24-hour home health care or nursing home care. Dsb8.

Pursuant to the newly enacted compassionate release statute, N.J.S.A. 30:4-123.51e,[3] the Commissioner of the DOC issued a

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[1] These sections, which are inextricably intertwined, are combined for the Court's convenience.

[2] In accordance with *Rule* 2:6-8, citations are as follows: "Dsb" is Defendant's supplemental brief, dated November 19, 2021; "Da" is the appendix to Defendant's supplemental brief; "1T" is volume one of the transcript of the hearing on Defendant's motion for compassionate release on May 13, 2021; "2T" is volume two of the same transcript.

[3] The statute, which was signed into law as part of a trio of sentencing reform bills aimed at addressing the consequences of

Certificate of Eligibility ("COE"), stating that F.E.D. meets the medical criteria for release; as the statute requires, F.E.D. then filed the necessary petition with the trial court. Da12, 14; Dsb2; *State v. F.E.D.*, 469 N.J. Super. 45, 51-52 (App. Div. 2021) (quoting the COE as stating that F.E.D. was eligible for compassionate release based upon his "'[s]evere dilated cardiomyopathy with unclear etiology; an ejection fraction of 10% - 15%; [and] underlying atrial appendage clot due to atrial fibrillation.'"). The trial court convened a hearing at which it heard testimony from the DOC physicians; the court also received letters and took testimony from additional witnesses regarding F.E.D.'s substantial rehabilitation, including his role within the prison as a mentor to younger inmates, encouraging education and deescalating conflict. Dsb8-10. At the hearing, F.E.D. addressed the court, expressing deep remorse for his crimes and citing his

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mass incarceration and the failure of the medical parole system to meaningfully respond to issues presented by gravely ill inmates. *See* Press Release, Governor's Office, *Governor Murphy Signs Sentencing Reform Legislation*, (Oct. 19, 2020), https://nj.gov/governor/news/news/562020/approved/20201019d.shtml ("Governor's Press Release"); Annual Report, *New Jersey Criminal Sentencing & Disposition Commission*, at 32-33 (Nov. 2019) ("Sentencing Commission Report"), https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf (recommending medical parole, which "is rarely used," be replaced by compassionate release, estimated to "increase the number of ill patients released from custody"), requires a medical diagnosis by two licensed physicians that the individual is terminally ill or suffering from a permanent physical incapacity, which is defined in relevant part as "a medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care[.]" N.J.S.A. 30:4-123.51e(*l*).

efforts to assist fellow inmates as an attempt to "give back" in whatever way he could following his wrongdoing. Dsb10.

The trial court denied F.E.D.'s petition, and the Appellate Division affirmed. *State v. F.E.D.*, 469 N.J. Super. 45, 56, 69 (2021). Reviewing the DOC's determination that F.E.D. suffered from a "permanent physical incapacity," the panel concluded that DOC misinterpreted the statutory definition of the phrase "permanently unable to perform activities of basic daily living, result[ing] in the inmate requiring 24-hour care[.]" *Id.* at 62. Specifically, the Appellate Division held that, under the statutes, an inmate is "permanently unable to perform activities of basic daily living" only if he or she is unable to perform *any ADLs*. *Id.* ("By stating that a person is 'unable to perform activities of basic daily living,' the Legislature meant 'unable to perform any activity of basic daily living.'"). Because F.E.D. could perform some ADLs with assistance – for example, one DOC physician said that "F.E.D. was '[a]ble to do ADL's [activities of daily living] but [it] takes a long time," and he had to 'stop' to 'rest after walking [a] short distance due to difficulty breathing,'" *id.* at 53 - the panel determined that the DOC had erred in issuing a COE. *Id.* at 65. The panel also interpreted the statutory requirement that F.E.D. be "so debilitated or incapacitated by the . . . permanent physical incapacity as to be permanently physically incapable of committing a crime if released" and that his release conditions "would not pose a threat to public safety," to be limited to those with severe dementia or

paralysis, holding that "a person with quadriplegia, if communicative . . . could enlist another to commit a crime on his or her behalf."). *Id.* at 67.

This Court granted certification in order to review this holding, which is not only heartless and draconian, but also unfaithful to the intent behind the new legislation. 248 N.J. 481 (2021). It should now reverse.

ARGUMENT

I. THE PLAIN LANGUAGE OF NEW JERSEY'S COMPASSIONATE RELEASE STATUTE IS CLEAR: "UNABLE TO PERFORM ACTIVITIES OF BASIC DAILY LIVING" REQUIRES THAT AN INMATE BE UNABLE TO PERFORM MORE THAN ONE SUCH ADL.

Fundamental to our democratic structure is the role of the "Legislature [as] the preeminent expositor of public policy in our democratic society." *New Jersey Div. of Child Prot. & Permanency v. J.R.-R.*, 248 N.J. 353, 373 (2021). As the Court is well-aware, the "paramount goal" in interpreting a statute or statutory scheme "is to give effect to the Legislature's intent." *Id.* at 374. The "starting point is always to examine whether the language of the statute expresses its plain meaning," *id.*, and to interpret the statute "so as to give sense to the legislation as a whole," *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). The Court may not, therefore, substitute its judgment for the Legislature's and write a new statute. *Serrano v. Serrano*, 183 N.J. 508, 510 (2005). Indeed, the Court recently acknowledged that it has "no commission to 'rewrite' a plainly written statute or reason to 'presume' that the Legislature intended a different policy from the one expressed

in the language of the statute." *J.R.-R.*, 248 N.J. at 374 (citing *DiProspero*, 183 at 492).

In this case, the plain language of the statute states, in no uncertain terms, the standard that the Legislature intended be used to determine "permanent physical incapacity" requiring a showing that the inmate is "unable to perform activities of basic daily living." Thus, the Legislature specifically employed the plural use of the word "activities" – that is, more than one - without any modifiers or qualifications. This was a legally significant choice. *See Singular and plural numbers*, 2A Sutherland Statutory Construction § 47:34 (7th ed.) ("As is always the case with statutory construction, courts prefer to rely on a word's plain, ordinary meaning where possible, and so give singular meaning to singular words and plural meaning to plural words absent a clear contrary intent."); *see also Selective Ins. Co. of Am. v. Thomas*, 179 N.J. 616 (2004) ("where singular and plural forms are used, generally 'discrete applications are favored *except* where a contrary intent or reasonable understanding is affirmatively indicated.") (quoting *id.* (6th ed.)).

The Appellate Division's construction, however, modifies "activities" to "activity" and, even worse, adds the term "any" to the statute though that word was not included in the provision enacted by the Legislature. This was error. *See State v. Roman-Rosado*, 462 N.J. Super. 183, 197 (App. Div. 2020) ("'We will not presume that the Legislature intended a result different from what is indicated by the plain language or add a qualification to a

statute that the Legislature chose to omit.'") (quoting *Timpson v. Farino*, 218 N.J. 450, 467-68 (2014)). Had the Legislature intended to include the term "any" as a modifier to the plural word "activities," it knew how to do so, as the language employed in other statutes demonstrates. *See, e.g.*, N.J.S.A. 13:1B.2 ("the term 'recreation' as used in this act means *any activity*, voluntarily engaged in . . . and includes *any activity* in the fields of music, drama, art, hanidcraft . . . and *any* formal activity incorporating *any* of them.") (emphasis added). It did not do so here, an important choice which deserves the Court's respect.

Nor will this render the statute overly lenient, in violation of the legislative intent. The remaining statutory language in the definition of "permanent physical incapacity" still necessitates an assessment by DOC physicians that the inmate will require 24-hour care, ensuring that the individual is seriously debilitated and an appropriate candidate for compassionate release, even if he has the ability to perform one or more ADLs. N.J.S.A. 30:4-123.51e(*l*). Thus, this construction is true to the statute's plain language, as well as, to the extent the Court finds the language ambiguous, the overall structure of New Jersey's new and innovative compassionate release system, discussed below.

II. COMPASSIONATE RELEASE IS A WIDELY-RECOGNIZED TOOL TO ADDRESS DEVELOPING FISCAL AND PRISON HEALTH CRISES IN PRISONS CREATED BY MASS INCARCERATION, AND NEW JERSEY'S LEGISLATIVE FRAMEWORK ESTABLISHES ITS INTENT TO APPLY THIS TOOL BROADLY.

A. The Aging Prison Landscape

Across this country, mandatory minimum sentences, statutes like the No Early Release Act, N.J.S.A. 2C:43-7.2, and tough-on-crime policies have resulted in lengthy sentences and the phenomenon of mass incarceration, in which the United States, though having only five percent of the world's population, accounts for twenty percent of incarcerated persons worldwide but less than five percent of the world's population.[4] *See* Roy Walmsley, Int'l Ctr. For Prison Studies, *World Prison Population List* (12th ed. 2018), available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (there are more than 2.1 million prisoners in the United States, which boasts the highest prison population rate of 655 inmates per 100,000 people). Those forces are now creating a burgeoning elderly prison population – between 2000 and 2010,

[4] The impact of such mass incarceration is borne disproportionately by communities of color, as racial disparities in the criminal justice context are widely documented. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010). In New Jersey in 2018, for example "Blacks account[ed] for 62 percent of the inmates, while being an estimated 15 percent of the New Jersey population." Sharon Price-Cates, *Implicit Bias New Science in Search of New Legal Strategies Toward Fair and Impartial Criminal Trials*, N.J. Law. 65-66 (Aug. 2018). Today, this is the worst such disproportion in the nation. *See The Color of Justice, Racial and Ethnic Disparity in State Prisons*, The Sentencing Project at 10 (2021), available at https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf.

the number of U.S. prisoners over 55 increased 181 percent, while the overall prison population increased only 17 percent. Brie A. Williams, *et al.*, *Addressing the Aging Crisis in U.S. Criminal Justice Health Care*, 60 *J. Am. Geriatric Soc'y* 1150, 1151 (2012) ("Addressing the Aging Crisis"). Likewise in New Jersey, the number of prisoners over 55 in 1990 was 49; ten years later, it had grown by 553 percent to 320. Cyrus Ahalt, MPP, *et al.*, *Paying the Price: The Pressing Need for Quality, Cost and Outcomes Data to Improve Correctional Healthcare for Older Prisoners*, 61 *J. Am. Geriatric Soc'y* 2013, Table 1 (2013) ("Paying the Price"); *Addressing the Aging Crisis* at 1152.

The age at which an inmate is considered "older" or "geriatric" varies among states, but the threshold is typically lower than for non-prisoners because "many incarcerated persons experience accelerated aging, which takes into account the high prevalence of risk factors for poor health common in incarcerated individuals." *Addressing the Aging Crisis* at 1151; *see generally* Editorial Board, *Why Keep the Old and Sick Behind Bars?*, New York Times (Jan. 3, 2017), available at https://www.nytimes.com/2017/01/03/opinion/why-keep-the-old-and-sick-behind-bars.html?_r=0 ("Federal data shows that prison inmates age more rapidly than people on the outside – because of stress, poor diet and lack of medical care"). Thus, research shows that older incarcerated individuals are "significantly more likely to have one or more chronic health conditions or disability[ies] than their community-dwelling counterparts." *Addressing the Aging*

Crisis at 1151. Indeed, even prior to incarceration, prisoners have "high rates of behavioral health risk factors and limited healthcare access" such that older prisoners have multiple – the average is three –early-onset chronical medical conditions. *See id.* at 1150-51.

It follows that older incarcerated individuals require more prison healthcare services than do younger inmates, including that these older inmates "are commonly treated in outside community hospitals for costly acute events related to chronic disease," stressing prison health care systems and budgets.[5] *Id.* at 1150. Thus, for example, a recent (2016) analysis of the U.S. Department of Justice Office of the Inspector General confirmed that aging inmates are more costly to incarcerate as a result of their medical needs, including the costs of medication, additional medical conditions, and increased staffing levels necessary to assist with activities of daily living. Office of the Inspector General, DOJ, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, i-ii (rev'd Feb. 2016), available at https://oig.justice.gov/reports/2015/e1505.pdf ("2016 DOJ OIG Report"). Moreover, these costs do not include the expense of

[5] Even where individuals who are granted compassionate release continue to receive healthcare from taxpayer-funded programs, "community-based health care systems that provide care to far larger numbers of individuals with serious illness are generally more cost efficient and suitable than prison-based systems." Brie Williams, *et al.*, *For Seriously Ill Prisoners, Consider Evidence-Based Compassionate Release Policies*, HealthAffairs, (Feb. 6, 2017), available at https://www.healthaffairs.org/do/10.1377/hblog20170206.058614/full/.

upgrades to prison facilities, which often cannot otherwise adequately house aging inmates. *Id.* at ii ("Aging inmates often require lower bunks or handicapped-accessible cells," and may struggle to navigate uneven terrain or stairs as mobility limitations progress). Available research suggests that "older prisoners thus cost three to nine times as much as younger prisoners to incarcerate." *Paying the Price* at 3.

The financial implications of this for taxpayers are severe, and their justification is dubious, given the evidence showing that incarcerating high numbers of older individuals serves minimal public safety purposes.[6] *See State v. Torres*, 246 N.J. 246, 273-74 (2021) (reviewing arguments that "older offenders are less likely to re-offend upon release" and remanding for resentencing where defendant would have been 77 when first eligible

[6] *See generally*, Travis Hirschi & Michael R. Gottfredson, *Age and the Explanation of Crime*, 89 *Am. J. Soc.* 552, 565 (1983) ("The empirical fact of a decline in the crime rate with age is beyond dispute."); Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, *Age and the Explanation of Crime, Revisited*, 42 *J. Youth & Adolescence* 921, 922 (2013) ("Crime bears a robust relationship with age, rapidly peaking in the late teen years, with a decline nearly as rapid soon thereafter, and continued declines throughout adulthood."); *see also* National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 155 (Jeremy Travis, Bruce Western & Steve Radburn eds., 2014) ("[R]ecidivism rates decline markedly with age."). Likewise in New Jersey, where the DOC has found an inverse relationship between age and future criminal activity in its recidivism reports, independent of other factors such as prior criminal history and offense of conviction. *See, e.g.*, State of N.J. Dep't of Corrections, *Release Outcome 2013: A Three-Year Follow Up* 39, https://www.state.nj.us/corrections/pdf/offender_statistics/2013_Release_Recidivism_Report.pdf.

for parole); *see also* Margaret M. Holland *et al.*, *U.S. Department of Corrections Compassionate Release Policies: A content Analysis and Call to Action*, OMEGA-J. Death and Dying 1, 3 (2018) ("*US DOC CR Policies Content Analysis*") (discussing fiscal implications for continued incarceration of compassionate-release eligible persons).

The budgetary implications of these facts are profound: the Department of Corrections already receives, by far the largest proportion of funds generates by the State budget, and even after the reduced number of prisoners resulting from policy responses to the COVID-19 pandemic, the FY 2022 budget recommendation for State prison facilities totals over $955 million. State of New Jersey Office of Management and Budget, *FY2022 Detailed Budget*, at 36, Table III Summary of Appropriations by Organization, available at https://www.nj.gov/treasury/omb/publications/22budget/pdf/FY22GBM.pdf. And "Institutional Care and Treatment," which includes medical care, makes up about a quarter of that appropriation. *Id.* at 151-52. While the budget does not segregate and identify the specific amount spent on geriatric medical care, data from other states indicates that it may be a substantial portion of that: "medical care alone consumed one fifth of state prison expenditures in 2015." *See* Mary Price, *Everywhere and Nowhere, Compassionate Release in the States*, Families Against Mandatory Minimums, at 9-10 (June 2018) ("*FAMM Report*"), available at https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf (citing Pew Trusts, *Prison Health Care: Costs and Quality*, 23 (Oct. 2017), available

at https://www.pewtrusts.org/~/media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf). With the recognition that incarcerated individuals have a constitutional right to proper medical care, *see Estelle v. Gamble*, 429 U.S. 97 (1976); *Saint Barnabas Med. Ctr. v. Essex Cty*, 111 N.J. 67, 74 (1988), it is obvious that the financial impact of "treating chronic conditions is a growing concern in light of the graying of state prison populations." *FAMM Report* at 9.

B. New Jersey's Compassionate Release Scheme in the Context of Other States' Initiatives

Underlying compassionate release policies is the theory that changes in health status may undermine the justifications for incarceration and sentence completion because, for example, an inmate may be "too sick to participate in rehabilitation, or too functionally compromised to pose a risk to public safety." Brie A. Williams, MD, *et al.*, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 Ann Intern Med. 122, 122 (2011) (citing William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 Md. L. Rev. 850 (2009)). Indeed, the joint statement released by the primary sponsors of New Jersey's compassionate release legislation on the day the bill was signed into law expressed that "[o]ur justice system is more than crime and punishment, it seeks to balance penalty with rehabilitation. By expanding upon what already exists we can show true compassion to those with profound

medical needs and those suffering terminal illness." Governor's Press Release.[7]

Such compassion is not only a core ethical principal for medical professionals, but was, then an expressed concern of New Jersey's policymakers as well. And it is a principle, grounded in the essence of insuring human dignity, that some have argued cannot be met for end of life patients in a custodial setting. *See* Andreas Mitchell, *et al.*, *Compassionate Release Policy Reform: Physicians as Advocates for Human Dignity*, 19 AMA J. Ethics 854, 856 (Sept. 2017) ("Each person has dignity, which is not subject to circumstance and persists regardless of the situational context in which a person may find himself, including incarceration."). Thus, compassionate release schemes serve as "human rights-oriented strategies for unifying families at the end of life and transferring persons to community-based health care systems that are better equipped to meet their complex health needs." Stephanie Grace Prost, PhD, *et al.*, *Strategies to Optimize the Use of Compassionate Release from US Prisons*, 110 Am. J. Public Health S25 (2020), available at https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305434.

But beyond the laudatory goals of promoting compassion and upholding human dignity, compassionate release is a widely-

[7] *Amicus* endorses F.E.D.'s arguments as to the appropriateness of considering contemporaneous sponsor statements in the Governor's Press Release in determining legislative intent. *See* Dsb23-24, n.10.

recognized "release valve" to address the financial and prison health issues arising from the challenges prisons face when trying to meet the special needs of older, ill or severely disabled prisoners.[8] Stephanie Grace Prost, PhD, Brie Williams, MD, MS, *Strategies to Optimize the Use of Compassionate Release from US Prisons*, 110 Am. J. Public Health S25 (2020), available at https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305434 ("*Strategies to Optimize Use of Compassionate Release*"). As a result, nearly every state in the country has implemented some form of compassionate release. *FAMM Report* at 12. These compassionate release programs seek to assure that old and sick inmates do not languish in custody, at taxpayer expense. *Id.* at 12-13.

That said, compassionate release, in New Jersey and elsewhere, has not been widely used. *Id.* Across industries, experts in the areas of medicine, social work, and prison reform have identified the reasons for this, in an effort to assist policymakers seeking to expand its use, making recommendations for overcoming those barriers with the goal of releasing more sick individuals from imprisonment. Significant to understanding the intent behind New Jersey's law, it is striking that our

[8] "This community requires targeted supports, such as ramps, lower bunks, and grab bars. Many prisons are quite old, with aging and poorly designed buildings causing health and safety problems for prisoners. . . . In some jurisdictions, fellow prisoners help those facing barriers getting to pill lines, medical appointments, meals, and even in and out of beds and wheelchairs." *FAMM Report* at 9-10.

Legislature included nearly every component of those recommendations for expansion in the legislation drafted to replace medical parole with a new compassionate release scheme. These recommendations cover eligibility, access to compassionate release programs and transition from the prison setting; as is set forth below, in each case, New Jersey followed the learning of those who advocated for the expanded use, and enhancement, of compassionate release.

Eligibility:

For example, New Jersey's eligibility criteria are, just as the experts suggesting the expanded use of compassionate release recommend, solely medically-based, and there is no requirement that an inmate have reached a certain age, have completed a certain percentage of his sentence, or have been convicted of a less serious offense. *Compare* N.J.S.A. 30:4-123.51e(a) ("the court may release an inmate who qualifies under this section for compassionate release at any time during the term of incarceration"), *with Strategies to Optimize Use of Compassionate Release* at S25-26 (barriers include "narrow eligibility requirements" such as "require[ing] patients to be of a certain age or to have served a specified portion of their sentence to qualify" or "exclude[ing] persons based on specific charges"); *US DOC CR Policies Content Analysis* at 18 ("lower age requirements" and "reduc[e] the use of lump exclusionary criteria").

Likewise, New Jersey's statute also expands eligibility beyond those who have a specific terminal diagnosis to include those with life-limiting or debilitating illnesses. *Compare* N.J.S.A. 30:4-123.41e(d)(2) (inmates eligible for COE if suffering from either a terminal condition or a permanent physical incapacity), *with Strategies to Optimize Use of Compassionate Release* at S26 (recommending "[r]evisiting existing policies to include 'life-limiting illnesses' or 'debilitating' conditions rather than relying on prognostic certainty"); *US DOC CR Policies Content Analysis* at 18 ("[w]iden diagnostic criteria to include . . . potentially debilitating conditions" and "remove prognosis requirement").

Finally, with respect to eligibility, New Jersey bases eligibility determinations on common-sense and objective eligibility criteria – again, just as the experts recommend. *Compare* N.J.S.A. 30:4-123.51e(b), (f)(1) (requiring medical professionals to make diagnosis, describe in detail, and determine eligibility, after which a court may order release if so incapacitated as to be physically incapable of committing a crime and conditions of release do not pose a threat to public safety), *with*, *FAMM Report* at 17 (commending Ohio's broad eligibility criteria as easily evaluated, which provides for release of 'medically incapacitated' prisoners who have any diagnosable medical condition" and "who cannot do things such as feeding or dressing themselves without significant assistance").

Access:

New Jersey also incorporated initiatives aimed at expanding compassionate release by making it more procedurally accessible. For example, the statute addresses potential lack of patient awareness by permitting a number of different individuals to initiate the compassionate release process. *Compare* N.J.S.A. 30:4-123.51e(c) ("A medical diagnosis to determine whether an inmate is eligible for compassionate release under this section may be initiated by the administrator, superintendent, or a staff member of a correctional facility" as well as "by the inmate, a member of the inmate's family, or the inmate's attorney"), *with FAMM Report* at 16 (commending states that actively identify and provide initial support to prisoners"). It also provides for representation by counsel in advance of a formal diagnosis to facilitate prompt applications and to assure that a capable and healthy individual is working on the petition. *Compare* N.J.S.A. 30:4-123.41e(d)(1) (following diagnosis of grave medical condition, DOC "shall promptly notify the inmate's attorney or, if the inmate does not have an attorney, the Public Defender, to initiate the process of petitioning for compassionate release"), *with FAMM Report* at 18 (recommending provision of counsel as best practice).

Finally, New Jersey's compassionate release scheme provides for reasonable time frames and does not prohibit re-application or subsequent parole. *Compare* N.J.S.A. 30:4-123.51e(e)(7) (if the petition is opposed "the court shall hold a hearing on the petition

on an expedited basis"), *and* N.J.S.A. 30:4-123.51e(k) (denial of petition or return to confinement shall not preclude an inmate from being considered for parole if eligible), *with US DOC CR Policies Content Analysis* at 18 ("encourage inclusion of explicit mechanisms and associated timelines for emergency reviews, appeals of denials, and reapplications"); *FAMM Report* at 19 (petitioners should have the right to appeal an adverse decision and ability to reapply). In this regard too, the New Jersey legislation very clearly and specifically adopted a scheme means to liberalize access to compassionate release.

Transition:

Finally, the Legislature adopted best practice recommendations aimed at removing barriers to discharge planning. For example, a number of states require release plans or even prohibit release absent a detailed discharge plan determining that health care needs and costs will be met upon release. *See FAMM Report* at 18. New Jersey also includes such a requirement, but critically, it places that burden not on the inmate, but on the Parole Board to ensure that the inmate's release plan identifies a community sponsor and verifies appropriate medical services and housing. *Compare* N.J.S.A. 30:4-123.51e(h)(1)-(3), *with FAMM Report* at 18; *Strategies to Optimize Use of Compassionate Release* at S25 (noting difficulty identifying appropriate post-release housing).

* * * * *

In sum, the Legislature's statutory framework for compassionate release incorporated numerous components – both substantive and procedural – that are addressed to removing barriers and expanding the availability of compassionate release, evidencing a clear intent to implement compassionate release broadly within our state prison system. It is, then, not only contrary to the statutory language, but also inconsistent with the Legislative intent, and thus a betrayal of the Courts' role, to construe this expansive statutory framework, which adopted so many evidence-based recommendations designed to expand compassionate release, in the narrow manner prescribed by the Appellate Division. *See State v. Rivastineo*, 447 N.J. Super. 526, 529 (App. Div. 2016) (quoting *State v. Shelley*, 205 N.J. 230 320, 323 (2011)) (primary purpose of statutory construction is to "effectuate the Legislature's intent").

The broader construction for which F.E.D. and amicus advocate is consistent with New Jersey's long history of being at the forefront of protections for vulnerable populations, including criminal defendants. *See, e.g.*, *State v. Earls*, 214 N.J. 564 (2013) (more protections against unreasonable searches and seizures); *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609 (2000) (greater protection of woman's right to choose); *State v. Novembrino*, 105 N.J. 95 (1987) (declining to adopt good faith exception to exclusionary rule); *Right to Choose v. Byrne*, 91 N.J. 287 (1982) (more protections for abortion funding); *see also State*

v. Hogan, 144 N.J. 216, 231-32 (1996) (collecting cases). The Appellate Division's decision is inconsistent with that proud tradition, and rather, places New Jersey behind even the most draconian systems in sister states, none of which require that an inmate be unable to perform *any* ADL with assistance. *See FAMM Report*, State Memos, available at https://famm.org/our-work/compassionate-release/everywhere-and-nowhere/#memos. The holding of the Appellate Division should be readily rejected by this Court.

III. THE APPELLATE DIVISION IGNORED THE REQUIREMENT THAT COURTS MAKING RELEASE DETERMINATIONS CONSIDER AN INMATE AS HE STANDS BEFORE THE COURT TODAY, INCLUDING POST-SENTENCE REHABILITATIVE EFFORTS.

Beyond the Appellate Division's conclusion that the medical assessments of the two DOC physicians and F.E.D.'s cardiologist were incorrect, the court also went on to address whether F.E.D. was capable of committing another crime and posed a threat to public safety. *See F.E.D.*, 469 N.J. Super. at 66-69. And although the Appellate Division described this section of its opinion as "limited observations," there can be no question but that trial courts will rely upon these statements, given their appearance a published appellate decision that currently serves as the only analysis of this statutory language. The Appellate Division's analysis, however, the panel strangely seeks to relegate it to dictum, requires this Court's intervention, and correction.

Specifically, the panel analogized a trial court's decision to grant or deny compassionate release to a determination of the appropriateness of pre-trial detention, *id.* at 66, discussing a litany of possible offenses that would preclude release. In doing so, the court not only inappropriately rewrote the statute, which does not include the enumerated offenses which disqualified an application for medical parole in New Jerseys' precursor statute, *compare* N.J.S.A. 30:4-123.51e(a), *with* N.J.S.A. 30:4-123.51c(a)(3), but also entirely failed to consider either the rehabilitative progress of the inmate, or his advanced age and thus the diminished likelihood of recidivism, *see supra*, Part II.a., n.6. But the lower court's conclusion sanctioning the refusal to give any consideration to a defendant's prior rehabilitative efforts is entirely inconsistent with clear United States and New Jersey Supreme Court precedent requiring precisely such consideration, including in circumstances like these. *See Pepper v. United States,* 562 U.S. 476 (2011); *State v. Jaffe,* 220 N.J. 114, 117, (2014); *State v. Randolph*, 210 N.J. 330 (2012).

This "observation" was, then, error. Because the question of whether an individual may be released into the community, the decision to grant compassionate release is similar to a court's evaluation of a *Rule* 3:21-10(b)(2) motion to modify one's sentence, which courts have recognized "amounts to a sentencing decision." *State v. Wright*, 221 N.J. Super. 123, 129 (App. Div. 1987); *State v. Priester*, 99 N.J. 123, 135 (1985). That is, consideration of an application for release, such as a *Rule* 3:21-10(b)(2) motion

"is an extension of the sentencing power of the court, involving the same complexity as the sentencing decision and the same delicate balancing of various factors." *Priester*, 99 N.J. at 135. And in the context of resentencing, the U.S. Supreme Court has concluded that "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant — if not essential — to [the] selection of an appropriate sentence." *Pepper*, 562 U.S. at 480 (internal citations and quotation marks omitted). As a result, remand is appropriate where a sentencing court has failed to consider such evidence, as the Appellate Division allowed to occur here. *See, e.g.*, *United States v. Bailey*, 459 Fed. Appx. 118, 120 (3d Cir. 2012); *see also Pepper*, 562 U.S. at 490 ("defendant's rehabilitation since his prior sentence" may support a lesser sentence).

In fact, New Jersey courts have required trial courts to consider "all current information," including "evidence related to post-sentencing rehabilitation" for over thirty years. *See State v. Towey*, 244 N.J. Super. 582 (App. Div.), *certif. denied*, 122 N.J. 159 (1990). This Court has consistently reaffirmed its commitment to "the 'principle that the punishment should fit the offender and not merely the crime,'" *Jaffe*, 220 N.J. at 123-24 (quoting *Randolph*, 210 N.J. at 342), and to the notion that fairness in sentencing contexts "cannot be divorced from consideration of the person on whom it is imposed." *Torres*, 246 N.J. at 273. "Assessing the overall fairness of a sentence

requires a real-time assessment . . . as the defendant appears before the court on the occasion of the sentencing." *Id.* at 273. For example, in *Randolph*, the Court held that the trial court was *required* to consider evidence of defendant's rehabilitative efforts between initial sentencing and resentencing. 210 N.J. at 354 ("when 'reconsideration' of sentence or 'resentencing' is ordered after appeal, the trial court should view defendant as he stands before the court on that day"). Likewise, in *Jaffe, the* defendant's sentencing was delayed by almost one year following his guilty plea; on appeal this Court reversed the sentence imposed because, as here, the trial court failed to consider evidence of the defendant's post-offense conduct, which reflected efforts at rehabilitation.[9] 220 N.J. 118; *see also State v. Towey, 244* N.J. Super. 582, 593-94 (App. Div.), certif. denied, 122 N.J. 159 (1990) (holding that "when resentencing has been ordered," the trial court must consider "all current information" that is relevant to an appraisal of aggravating and mitigating factors, including evidence related to post-sentencing rehabilitation).

In sum, in evaluating an application for compassionate release, a trial court must, in the exercise its plenary sentencing authority, fully and fairly consider a defendant's

[9] *Amicus* understands from the briefing that those efforts include letters and testimony from witnesses regarding F.E.D.'s role within the prison as a mentor to younger inmates, encouraging education and deescalating conflict, Dsb8-10, as well as F.E.D.'s own statements to the trial court, expressing deep remorse for his crimes and citing his efforts to assist fellow inmates as an attempt to make amends, Dsb10.

proffered evidence of rehabilitation, physical impairment, and advanced age, all of which are relevant to the question of whether he or she poses a danger to the community. *See, e.g.*, *Torres*, 246 N.J. at 274 ("age is a fact that can and should be in the matrix of information assessed by a sentencing court").

CONCLUSION

For the reasons set forth above, *Amicus Curiae* the ACDL-NJ respectfully urges the Court to reverse the decision of the Appellate Division, in furtherance of the Legislative intent to broaden the availability of compassionate release, and endorse a plain language reading of the statutory definition of "permanent physical incapacity": "unable to perform activities [that is, plural, or more than one activity] of basic daily living[.]" In addition, *Amicus* respectfully asks this Court to make clear that the Appellate Division's failure to account for a trial court's obligation to meaningfully consider the inmate as he or she stands (or sits in a wheelchair on oxygen) before the court, including evidence of rehabilitation and advanced age is inconsistent with the law and with New Jersey's tradition of fair sentencing.

Respectfully submitted,

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500
Counsel for Amicus Curiae

BY: *s/ Anne M. Collart*
Anne M. Collart, Esq.

Dated: December 20, 2021

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2554-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

F.E.D.,

Defendant-Appellant.

APPROVED FOR PUBLICATION
August 16, 2021
APPELLATE DIVISION

Argued June 9, 2021 – Decided August 16, 2021

Before Judges Ostrer, Accurso, and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 79-01-1131.

Alison Gifford, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Alison Gifford and Lucy Gray-Stack, Assistant Deputy Public Defender, of counsel and on the briefs).

Frank J. Ducoat, Special Deputy Attorney General/ Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Frank J. Ducoat, of counsel and on the brief).

The opinion of the court was delivered by

OSTRER, P.J.A.D.

Effective February 1, 2021, the Legislature removed the Parole Board's power to grant "medical parole" to terminally ill or permanently incapacitated inmates, and, instead, empowered the courts to grant such inmates "compassionate release." L. 2020, c. 106, § 1 (codified at N.J.S.A. 30:4-123.51e); see also N.J.S.A. 30:4-123.51c (2001) (repealed by L. 2020, c. 106, § 3) (medical parole). F.E.D., seventy-two and suffering from heart disease, took advantage of the new law; convicted of three murders and serving two life sentences since 1982, F.E.D. petitioned the court for compassionate release.[1]

During the subsequent hearing, he asserted he satisfied the three prerequisites for such discretionary relief: he suffered from a "permanent

[1] We use initials because N.J.S.A. 30:4-123.51e(e)(4) declares: "The information contained in the petition and the contents of any comments submitted by a recipient in response thereto shall be confidential and shall not be disclosed to any person who is not authorized to receive or review the information or comments." It is practically impossible to write this opinion without addressing such information. Rule 1:38-1A does permit us to refer to "information in court records even when those records are excluded from public access," but it is unclear if the rule applies to records that statutes, rather than rules, exclude from public access. In any event, a directive requires us to adhere to the statutory provision. See Administrative Directive #04–21, "Criminal — Procedures for Compassionate Release Pursuant to N.J.S.A. 30:4-123.51e," at 2 (Feb. 1, 2021) ("The petition, responses, and information related to the petition . . . shall be confidential pursuant to N.J.S.A. 30:4-123.51e(e)(4)."). We withhold comment on the wisdom of the Legislature's decision to limit public disclosure of prisoners' early release petitions, and on the constitutionality of a statute restricting the content of judicial opinions, see Winberry v. Salisbury, 5 N.J. 240, 255 (1950).

physical incapacity" (that is, a condition that "did not exist at the time of sentencing," and rendered him "permanently unable to perform activities of basic daily living" and in need of "24-hour care"); he was "physically incapable" of reoffending; and his release "would not pose a threat to public safety." See N.J.S.A. 30:4-123.51e(d), (f), (l). After the hearing, the court denied his petition, finding that he did not satisfy the first and third requirements (without discussing the second requirement).

F.E.D. contends on appeal that the court misinterpreted the statute and found, contrary to the factual record, that he still posed a risk to the public. His arguments are unavailing. To petition for compassionate release, F.E.D. had to present a valid "Certificate of Eligibility for Compassionate Release" from the Department of Corrections, attesting that he suffered from a terminal disease or a permanent physical incapacity. F.E.D.'s certificate was invalid; the medical diagnoses on which the certificate relied did not conclude that F.E.D. was terminally ill or unable to perform activities of basic daily living. Because the court could not even consider F.E.D.'s petition without a valid certificate of eligibility, we do not decide if the court abused its discretion when it found that F.E.D. failed to show, by clear and convincing evidence, that he would not pose a threat to public safety.

I.

We start by summarizing the compassionate-release statute. Accepting a recommendation of the New Jersey Criminal Sentencing & Disposition Commission, Annual Report: November 2019 30-33 (2019) [hereinafter Sentencing Commission Report], the Legislature empowered courts to grant qualifying inmates "compassionate release" regardless of their parole-eligibility date, see N.J.S.A. 30:4-123.51e(f)(1) (stating that such release is "[n]otwithstanding" N.J.S.A. 30:4-123.53). As the Commission proposed, Sentencing Commission Report at 31, the statute retains the medical-parole statute's criteria for release, but it adopts procedures to hasten decision-making. Compare N.J.S.A. 30:4-123.51c (2001) (repealed by L. 2020, c. 106, § 3) (medical parole) with N.J.S.A. 30:4-123.51e (compassionate release). The Legislature also lifted the medical-parole-law's exclusion of inmates convicted of murder, manslaughter and some other serious crimes. Compare N.J.S.A. 30:4-123.51c (2001) with N.J.S.A. 30:4-123.51e.

Before petitioning the court for release, an inmate must procure a certificate of eligibility from the Corrections Department. "No petition for compassionate release may be submitted to the court unless . . . accompanied by a Certificate of Eligibility for Compassionate Release." N.J.S.A. 30:4-123.51e(f)(2). And the Department must "promptly issue" the certificate if

two department-designated physicians "determine[] that an inmate is suffering from a terminal condition, disease or syndrome, or permanent physical incapacity." N.J.S.A. 30:4-123.51e(b), (d)(2). A "terminal condition, disease or syndrome" means "that an inmate has six months or less to live," and a "permanent physical incapacity" means "that an inmate has a medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing." N.J.S.A. 30:4-123.51e(l).

Armed with the certificate (and the Public Defender's help, if needed, N.J.S.A. 30:4-123.51e(d)(3)), the inmate may petition the court, upon notice to the prosecutor and the inmate's victims. N.J.S.A. 30:4-123.51e(e)(2). The prosecutor and the victims may, within tight timeframes, voice opposition. N.J.S.A. 30:4-123.51e(e)(3) to (7).

Then, the court "may" grant "compassionate release" — but only if the court "finds[,] by clear and convincing evidence[,] that the inmate is so debilitated or incapacitated by the terminal condition, disease or syndrome, or permanent physical incapacity as to be permanently physically incapable of committing a crime if released." N.J.S.A. 30:4-123.51e(f)(1). With inmates who are only physically incapacitated, the court must also find that "the

conditions established" for the inmate's release "would not pose a threat to public safety."[2] Ibid.

And even if the inmate overcomes all those hurdles, the statute, by stating that "the court may order . . . compassionate release," grants the trial court discretion to deny it. N.J.S.A. 30:4-123.51e(f)(1) (emphasis added); see Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000) ("[T]he word 'may' ordinarily is permissive.").

Compassionately released inmates must also obey the usual parole conditions; if they do not, they may be sanctioned. See N.J.S.A. 30:4-123.51e(a) (stating that compassionately released inmates "shall be subject to custody, supervision, and conditions" under N.J.S.A. 30:4-123.59, and sanctions under N.J.S.A. 30:4-123.60 to 65); and N.J.S.A. 30:4-123.51e(i) (referring to "conditions imposed pursuant to" N.J.S.A. 30:4-123.59). Also, if the inmate's condition so improves that he or she would not qualify for compassionate release, then the inmate may be returned to custody. N.J.S.A. 30:4-123.51e(j).

[2] Those conditions appear in "the inmate's release plan," which also addresses the inmate's housing and medical-care needs. Ibid.; N.J.S.A. 30:4-123.51e(h).

II.

In F.E.D.'s March 17, 2021 petition for compassionate release, he included a certificate of eligibility, signed by the Corrections Department Commissioner, stating that F.E.D. was "eligible and m[et] the requirement for Compassionate Release" because he was "diagnosed with a terminal condition, disease or syndrome, or a permanent physical incapacity" — specifically, "[s]evere dilated cardiomyopathy with unclear etiology; an ejection fraction of 10% - 15%; [and] underlying atrial appendage clot due to atrial fibrillation."

The commissioner signed the certificate following the written recommendation of the department's "Managing Physician/Psychiatrist," Hesham Soliman, M.D.[3] Referring to the "two Physician attestations required under the law," Dr. Soliman said, "I see a medical condition that would be fatal in the near future or [a] permanent physical disability" — not, as the statute requires, a terminal condition resulting in death in "six months or less" or a "permanent physical incapacity" (emphasis added). Although Dr. Soliman wrote that "[F.E.D.] requires home health care" (or, if that was unavailable,

[3] Although the statute contemplates no formal role for the department's medical director in the compassionate-release process, the department has proposed regulations requiring "the health services unit medical director" to "make a medical determination of eligibility or ineligibility" based on two physician's diagnoses "and issue a memo to the Commissioner . . . detailing the same." 53 N.J.R. 675(a) (May 3, 2021) (proposing N.J.A.C. 10A:16-8.6(a)).

nursing-home care), he did not specify that F.E.D. could not perform activities of basic daily living and required twenty-four-hour care.

The two physicians' written diagnoses (or "attestations," per Dr. Soliman), prepared in mid-February 2021, addressed F.E.D.'s "Diagnosis," "Prognosis," "Continued Care Needs," and "Physical/Mental Limitations (if any)."[4] The physicians, Sharmalie Perera, M.D., and Barrington Lynch, M.D., diagnosed F.E.D. with cardiomyopathy with an ejection fraction of ten to fifteen percent; atrial flutter or atrial fibrillation; and heart failure. Dr. Perera also noted that F.E.D. had coronary-artery disease and had received an arterial stent in December 2020, and Dr. Lynch indicated that F.E.D. could improve with "a transitional Automatic Implantable Cardioverter Defibrillator" followed by a heart transplant "as a permanent solution." Both physicians stated that F.E.D.'s prognosis was poor, but neither physician opined about F.E.D.'s life expectancy. Also, neither physician stated that F.E.D. was "permanently unable to perform activities of basic daily living" and required "24-hour care," see N.J.S.A. 30:4-123.51e(l), although they agreed that F.E.D. should wear a "life vest" to prevent "lethal ventricular fibrillation arrest."

[4] These four categories loosely match those dictated by the department's existing medical-parole regulations, N.J.A.C. 10A:71-3.53(e)(1) to (4), and the proposed compassionate-release regulations, 53 N.J.R. 675(a) (May 3, 2021) (proposing N.J.A.C. 10A:16-8.5(a)(1) to (4)).

The physicians also agreed that F.E.D. should continue to live in the infirmary. Dr. Perera said so "due to [F.E.D.'s] diminished physical function"; F.E.D. was "[a]ble to do ADL's [activities of daily living] but [it] takes a long time," and he had to "stop" to "rest after walking [a] short distance due to difficulty breathing." Dr. Lynch said F.E.D. should live in the infirmary "due to diminished ability" — not inability — "in instrumental activities of daily living."[5] Both physicians said F.E.D.'s condition disabled him from working or exercising.

Referring to F.E.D.'s aftercare (his care if released), the physicians said that he would need "significant help" (Dr. Lynch) or "assistance" (Dr. Perera) with laundry, grocery shopping, meal preparation and house cleaning. But, neither physician said that F.E.D. currently needed an aide for basic activities like toileting, bathing, eating, or dressing. Dr. Lynch said that F.E.D. would need a walker only "as his condition deteriorate[s]"; Dr. Perera agreed, saying that F.E.D. "may need [a] walker or [a] wheel chair [sic] when breathing pro[b]lems worsen."

The prosecutor opposed F.E.D.'s petition. At the subsequent plenary hearing, the prosecutor presented no witnesses, but several witnesses testified on F.E.D.'s behalf, and F.E.D. presented numerous letters supporting his

[5] The modifier "instrumental" is significant, as we discuss below.

release. F.E.D.'s wife testified about her willingness to house and care for F.E.D., and two former fellow inmates discussed F.E.D.'s rehabilitation and how he helped other inmates' rehabilitation, including their own. F.E.D. himself said he was sorry for his crimes and had become rehabilitated. And, although Dr. Lynch and Dr. Perera did not testify, Dr. Soliman and an outside cardiologist who treated F.E.D., Mark Soffer, M.D., testified about F.E.D.'s serious condition.

Dr. Soffer described F.E.D.'s heart condition, but he declined to assess F.E.D.'s ability to perform activities of daily living. Dr. Soffer explained that in late 2020, F.E.D. suffered from heart failure (measured by a low ejection fraction — that is, "how well the left ventricle . . . the main pumping chamber of the heart, squeezes"). He was short of breath, and his legs were swollen. He also suffered from arrhythmia, which may have added to his problems.

By January 2021, after wearing a life vest (which shocked his heart as needed to treat irregular rhythm) and receiving a stent to treat coronary-artery disease, F.E.D.'s condition had "significantly improved"; "he was breathing much better" and "was minimally short of breath." According to a March 2021 echocardiogram, his ejection fraction had improved from ten-to-fifteen percent to twenty-five-to-thirty percent, but was still under the fifty-five percent norm.

But on May 12, 2021, the day before the court hearing, F.E.D. told Dr. Soffer that he became "short of breath" when he lay down in bed, and "very short of breath" when he walked short distances. He also told Dr. Soffer that his life vest shocked him once in February. During that meeting, Dr. Soffer observed that the swelling in F.E.D.'s legs had "almost completely gone"; however, F.E.D. was breathing abnormally fast.

Using a widely accepted statistical model, Dr. Soffer opined that F.E.D.'s one-year and five-year mortality rates were fourteen and fifty-five percent, which would drop to eleven and forty-nine percent if he received an implanted defibrillator. Dr. Soffer diagnosed F.E.D. with "Class 3 Stage C heart failure," meaning he was symptomatic "at . . . low levels of activity or at rest."

Dr. Soliman concluded that F.E.D. satisfied the preconditions for compassionate release. The physician said that F.E.D.'s severe cardiomyopathy made the "likelihood of . . . a terminal condition in the next six months . . . possible." He also noted that F.E.D. remained in the infirmary. Dr. Soliman maintained that, despite the improvement Dr. Soffer had observed, F.E.D. qualified for compassionate release, because his severe cardiomyopathy persisted and his ejection fraction could worsen.

Regarding activities of daily living, Dr. Soliman testified that F.E.D. "does not ambulate, and his ADL . . . is limited." He ambiguously said that F.E.D. "cannot take care of himself in bathing" and "[o]n a limited basis he can take . . . a little more time to do it." He then noted that, according to Drs. Lynch and Perera, F.E.D. was "very limited in doing his ADLs." Asked if F.E.D. would need "24-hour care," Dr. Soliman said, "He would need some assistance in getting around. . . . I would say that . . . if his staging gets worse, he will need nursing home -- skilled nursing home." But presently, "he may be able to have somebody help him with his ADLs. And that means that somebody would take him to the bathroom, somebody would wheel him around . . . if he was to leave the . . . house."

In summation, F.E.D.'s counsel argued that F.E.D. suffered from a permanent physical incapacity because he had lived in the infirmary for months, could "barely walk," lost "his breath if he walked a few steps," and needed help with laundry, grocery shopping, bathing, and cleaning.[6] And although F.E.D. had improved recently, his condition would persist. Counsel also argued that F.E.D. was "physically incapable of committing a crime" under the statute. According to counsel, F.E.D. satisfied this condition

[6] Counsel did not argue that F.E.D suffers from a "terminal condition, disease or syndrome."

because he was unable to commit "crimes that require some level of physicality and that pose a threat to public safety." Lastly, referring to the character witnesses, F.E.D.'s own testimony and institutional record, and F.E.D.'s age, counsel argued that F.E.D. would not pose a threat to public safety if released.

By contrast, the State contended F.E.D. did not suffer a "permanent physical incapacity" as the statute defined it, because the record did not demonstrate he was unable to perform activities of basic daily living. Pointing to F.E.D.'s serious and extensive criminal behavior, the State also argued that he remained a threat to public safety.

In denying F.E.D.'s petition, the trial court found that F.E.D. did not prove by clear and convincing evidence he had a "permanent physical incapacity" under the statute. Noting that the statute did not define "activities of basic daily living," the judge found instructive Medicaid long-term-care requirements, which describe "activities of daily living" as including "bathing, dressing, toileting, locomotion, transfers, eating and mobility." The judge noted that neither Dr. Lynch nor Dr. Perera opined that F.E.D. was "unable to perform . . . activities of basic daily living."

Because F.E.D. did not prove he had a permanent physical incapacity, the court did not decide if such an incapacity made him "permanently

physically incapable of committing a crime if released." But the court did decide F.E.D. had not proved that "the conditions . . . under which [he] would be released would not pose a threat to public safety." The court considered the reference to a threat to public safety to be categorical. By contrast, the regular parole statute refers to "a reasonable expectation that [an] inmate will violate conditions of parole," N.J.S.A. 30:4-123.53(a) (emphasis added), and the Criminal Justice Reform Act refers to release conditions that "reasonably assure . . . the protection of the safety of any other person or the community," N.J.S.A. 2A:162-19 (emphasis added).

To guide its decision, the court analyzed several of the factors that guide the Parole Board in deciding whether to grant regular parole. See N.J.A.C. 10A:71-3.11. Although "recent positive evidence" corroborated F.E.D.'s rehabilitation, the court ultimately gave greater weight to F.E.D.'s extensive record of criminal behavior — including violent criminal behavior — beginning in his teens; the nature and circumstances of the three homicides for which he was convicted; and F.E.D.'s statement in his pre-sentence report that he might kill again.

This appeal, which we accelerated, followed.

III.

Arguing that the court should have granted him compassionate release, F.E.D. presents three contentions: (1) he suffers from a "permanent physical incapacity" because he requires substantial assistance to perform activities of basic daily living; (2) he would pose no threat to public safety, because he has rehabilitated himself and is in poor health, his age is inversely correlated with recidivism, and he would have a strong support system; and (3) he is permanently physically incapable of reoffending.[7]

A.

We begin with the threshold question: whether F.E.D. suffers from a permanent physical incapacity.[8] Because the statute delegates that question to the Corrections Department in the first instance — by requiring that two designated physicians make that diagnosis, and by requiring the department to issue the essential certificate of eligibility once they do — we conclude that a trial court owes some deference to the agency's determination. Rather than determine anew if an inmate has a permanent physical incapacity, then, a trial

[7] As noted, the trial court did not reach that third issue.

[8] Because F.E.D. does not assert that he has a terminal illness, we consider the issue waived, see Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011), and avoid knotty related issues (such as the percentage required to establish "that an inmate has six months or less to live" when applying models like the one Dr. Soffer used).

court must determine whether the agency's decision conforms with the law, is supported by credible evidence and is not unreasonable — in other words, whether it is arbitrary or capricious. See In re State & Sch. Emps.' Health Benefits Comm'ns' Implementation of Yucht, 233 N.J. 267, 280 (2018) (defining arbitrary and capricious standard).

Notably, the statute does not expressly instruct the court to decide anew if a petitioner meets the permanent-physical-incapacity requirement. Rather, the statute instructs the court to decide — given the inmate's permanent physical incapacity — if the inmate is physically incapable of committing a crime, and if the inmate poses a threat to public safety. For example, the court must decide if the "inmate is so debilitated or incapacitated by the terminal condition, disease or syndrome, or permanent physical incapacity as to be permanently physically incapable of committing a crime if released." N.J.S.A. 30:4A-123.51e(f)(1) (emphasis added). And the court must consider "a threat to public safety" "in the case of a permanent physical incapacity." Ibid. At the same time, the statute does not expressly command a trial court to accept the agency's eligibility determination without scrutiny.

Because the law is unclear, we refer to the legislative history. See State v. Munafo, 222 N.J. 480, 488 (2015) ("If the language is unclear, courts can turn to extrinsic evidence for guidance, including a law's legislative history.").

The bill and committee statements are silent on the question; however, the Sentencing Commission Report provides guidance. See State v. Molchor, 464 N.J. Super. 274, 290 (App. Div. 2020) ("[W]e may look for guidance to the statements of intent that a study commission expressed in recommending [a] statute's enactment"), aff'd sub nom. State v. Lopez-Carrera, 245 N.J. 596 (2021).

The commission stated that "[a]fter a hearing, the court could order the inmate's release upon a finding that . . . [t]he certificate of eligibility was valid and its issuance was proper." Sentencing Commission Report at 31. Therefore, the commission clearly contemplated that courts would review the department's determination, neither deciding eligibility anew nor blindly accepting the agency's decision.

By reviewing the agency's eligibility decision — as opposed to deciding eligibility anew — the court furthers the overarching legislative goal of expediting review of compassionate-release applications. See Sentencing Commission Report at 32 (attributing prior medical-parole law's limited use (in part) to delays in processing applications, and proposing measures to reduce delays); A. L. & Pub. Safety Comm. Statement to A. 2370, at 2 (July 20, 2020) (noting that the bill provides for expedited hearings on compassionate-release petitions). Deciding eligibility anew would fly in the face of this goal by

inevitably adding time to the process. Judicial review also increases efficiency by granting primary authority to those physicians best situated to assess the inmate.[9]

Nonetheless, as with judicial review of agency determinations in other contexts, we are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), although we afford deference "to the interpretation of the agency charged with applying" a statute, Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015). Nor are we bound by the trial court's statutory interpretation. In re Civil Commitment of W.W., 245 N.J. 438, 448 (2021).

B.

Although the trial judge did not expressly apply this standard of review, he correctly rejected the commissioner's threshold eligibility determination. In reviewing the trial court's determination, we begin by agreeing with the trial court that "activities of basic daily living" involve the rudimentary tasks of "bathing, dressing, toileting, locomotion, transfers, eating and mobility" (as opposed to, for example, shopping, cooking meals, laundering clothes, and house cleaning).

[9] We presume that if an inmate requested, but was denied, the requisite physicians' diagnoses or the certificate of eligibility, the inmate could seek our review of that denial as a final agency decision. See R. 2:2-3(a)(2).

The statute does not define the phrase "activities of basic daily living." Nor did the prior medical-parole statute, N.J.S.A. 30:4-123.51c (2001) (repealed by L. 2020, c. 106, § 3), its implementing regulations, N.J.A.C. 10A:71-3.53, or the department's proposed regulation implementing the compassionate-release statute, 53 N.J.R. 675(a) (May 3, 2021). And the legislative history is as silent as the statute on the term's meaning.

But we deem persuasive the definition California has adopted to implement a strikingly similar statutory scheme for medical parole. California's law provides that an eligible inmate "shall" receive medical parole if (1) the head physician at the inmate's institution determines "that the prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour care, and that incapacitation did not exist at the time of sentencing" and (2) the parole board "determines that the conditions under which he or she would be released would not reasonably pose a threat to public safety." Cal. Penal Code § 3550 (Deering).[10] California's implementing regulations state that "[a]ctivities of

[10] New Jersey's medical-parole law appears to have followed the California model, although the legislative history does not say so expressly. California authorized medical parole for permanently incapacitated inmates in 2010. See 2010 Cal. Stats. ch. 405. New Jersey first authorized medical parole for such

basic daily living are breathing, eating, bathing, dressing, transferring, elimination, arm use, or physical ambulation." Cal. Code Regs. tit. 15, § 3359.1(a)(1)(2021).

We recognize that various other New Jersey laws and regulations define the phrase "activities of daily living"; however, the Legislature chose not to import those definitions into the compassionate-release statute. Such definitions should be considered in the light of the underlying goal of the statutory scheme in which they are found. It is one thing to consider a person's capacity to perform certain activities in defining consumers of "approved adult family care homes,"[11] or in determining if persons may receive insurance

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inmates in 2017; until then, medical parole had been limited to terminally ill inmates. See L. 2017, c. 235, § 1; A. L. & Pub. Safety Comm. Statement to A. 1661, at 1 (Feb. 4, 2016). The New Jersey statute, unlike the California one, "maintain[ed] the Parole Board's discretion in determining whether an inmate should be released on medical parole," A. Appropriations Comm. Statement to A. 1661, at 2 (June 20, 2016), and also omits the word "reasonably" in the phrase "would not reasonably pose a threat to public safety." We return to that distinction in our discussion of the trial court's finding regarding the threat to public safety.

[11] See N.J.S.A. 26:2Y-3 (defining "adult family care" as a "24-hour per day living arrangement for persons who . . . need assistance with activities of daily living" and defining "activities of daily living" as "functions and tasks for self-care which are performed either independently or with supervision or assistance, which include, but are not limited to, mobility, transferring, walking, grooming, bathing, dressing and undressing, eating, and toileting").

benefits,[12] enter certain viatical settlements,[13] or receive nursing-facility services.[14] It is another thing to use an inmate's performance of "activities of basic daily living" to assess his or her ability to reoffend or threaten public safety. Nonetheless, these various formulations support the trial court's decision that "activities of basic daily living" include only rudimentary but indispensable tasks like bathing, dressing, toileting, locomotion, transfers, eating and mobility. Including the modifier "basic" before "daily living" also reflects an intention to cover only the most fundamental daily activities —

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[12] Some individuals may receive family-leave-insurance benefits if they must care for certain family members who are "incapable of self-care." A person is incapable of self-care if he or she cannot independently perform three or more "activities of daily living" or "instrumental activities of daily living," where the former includes "adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating" and the latter includes "cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc." N.J.A.C. 12:15-1.1A. The distinction between "instrumental activities of daily living" and "basic activities of daily living" also appears in other places. See N.J.S.A. 26:2H-5.25 (regarding after-care assistance); Peter F. Edemekong et al., Activities of Daily Living, NCBI (2021) https://www.ncbi.nlm.nih.gov/books/NBK470404.

[13] See N.J.S.A. 17B:30B-2 (defining "[c]hronically ill" persons to include persons "unable to perform at least two activities of daily living, including, but not limited, to eating, toileting, transferring, bathing, dressing or continence").

[14] See N.J.A.C. 8:85-2.1(a)(1) (noting that nursing-facility residents "are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating)").

certainly not activities like shopping, house cleaning, food preparation and laundry.

F.E.D. contends that a person who can perform an activity of basic daily living only with another's help is "unable to perform" it. That may be so, but we disagree with his contention that requiring assistance with "several" or "nearly all" "activities of basic daily living" satisfies the statute. That would be a vague standard indeed, one we doubt the Legislature intended. And if a person who cannot perform some "activities of basic daily living" satisfies the statute, does it matter which activities those are?

F.E.D. argues that some is enough, because the Medicaid program authorizes nursing-home care for persons who need "hands on assistance with three or more activities of daily living,"[15] and the compassionate-release statute is linked to Medicaid — that is, it requires that inmates receive help applying "for medical assistance benefits under the Medicaid program." N.J.S.A. 30:4-123.51e(h)(3). But the statute's bare reference to help applying for Medicaid is too weak a signal that the Legislature intended to import Medicaid's long-term-care standard of needing help with three activities of

[15] For this information, F.E.D. quotes Medicaid Managed Long Term Servs. & Supports, State of N.J., Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs., https://www.nj.gov/humanservices/dmahs/home/mltss.html (last visited July 29, 2021).

daily living. If the Legislature intended to refer to less than all activities, it could have done so. Cf. N.J.S.A. 17:30B-2 (setting the number at two); N.J.A.C. 12:15-1.1A (setting the number at three). By stating that a person is "unable to perform activities of basic daily living," the Legislature meant "unable to perform any activity of basic daily living."

We also reject F.E.D.'s contention that "legislative history," in the form of sponsors' post-enactment press statement, supports his interpretation.[16] True, two of the statute's sponsors acknowledged that the medical-parole system resulted in the release of few "gravely ill inmates" and that the new legislation was intended to "show true compassion to those with profound medical needs." Press Release, Governor Murphy Signs Sentencing Reform Legislation (Oct. 19, 2020), https://www.nj.gov/governor/news/news/562020/20201019d.shtml (joint statement of Assemblyman Gary Schaer and Assemblywoman Verlina Reynolds-Jackson). Yet, the Sentencing

[16] A sponsor's post-enactment statement is a shaky foundation on which to rest a statutory interpretation. By that time, the legislator's job is complete and the opportunity for fellow legislators to respond has passed. See State v. Bey (I), 112 N.J. 45, 98 (1988) ("[P]ost-enactment . . . statements should not normally inform the construction and application of a precedent statute."); N.J. Coal. of Health Care Pros., Inc. v. N.J. Dep't of Banking & Ins., 323 N.J. Super. 207, 255-56 (App. Div. 1999). By contrast, a Governor's signing statement carries weight because a Governor, in issuing it, exercises his or her role in the legislative process. See Perez v. Rent-A-Center, Inc., 186 N.J. 188, 215 (2006) (considering Governor's signing statement in determining legislative intent).

Commission proposed to increase the number of releasees not by relaxing the medical-parole standards, but by streamlining procedure and tightening timeframes. Sentencing Commission Report at 31-32 (discussing medical-parole standards, proposing that Legislature "establish similar standards" for compassionate release, and noting that "one significant reason" medical parole was "rarely used" was because of procedural delays). The Legislature based the statute on the commission's recommendations, S. Judiciary Comm. Statement to First Reprint of A. 2370, at 1 (Aug. 24, 2020); it also expanded the pool of potential beneficiaries by making convicted murderers and kidnappers, among others, eligible, cf. N.J.S.A. 30:4-123.51c(a)(3) (2001) (repealed by L. 2020, c. 106, § 3) (excluding certain offenders from medical parole).[17]

C.

Applying this understanding of the statute and the court's role, we affirm the court's denial of F.E.D.'s petition. We do so because the commissioner's certificate of eligibility was invalid. It did not conform to the law's requirement that two physicians diagnose F.E.D. with a "permanent physical

[17] The Commission and the Legislature intended to reduce the Corrections Department's costs of caring for terminally ill and permanently incapacitated inmates. Sentencing Commission Report at 33. However, a fiscal estimate predicted, at best, modest savings. A. Appropriations Comm. Statement to A. 2370, at 6 (July 27, 2020).

incapacity as defined." See N.J.S.A. 30:4-123.51e(b), (d)(2). Specifically, the diagnoses did not determine that F.E.D. was "permanently unable to perform activities of basic daily living." See N.J.S.A. 30:4-123.51e(l).

Rather than find F.E.D. unable to perform activities of daily living, Dr. Perera affirmatively found that he could "do ADL's," although they "take[] a long time."[18] Dr. Lynch did not expressly address "activities of basic daily living," but he noted that F.E.D. should be housed in the infirmary "due to diminished ability in instrumental activities of daily living" (emphasis added). As we have noted, "instrumental activities of daily living" are distinct from "basic activities of daily living" and include tasks like shopping, cooking and cleaning.

And Dr. Lynch's statement that F.E.D. would need a "[w]heeled [w]alker for **fall** prevention as his condition deteriorate[s]" indicated that F.E.D. was currently capable of ambulating (a basic activity of daily living) without one.

[18] We acknowledge that some may argue that if it takes a person too long to perform a task — like donning socks and shoes, or managing a fork or spoon — one might say (although the two physicians did not) that the person was "unable to perform" the task under the statute. Measuring the ability to perform activities of daily living is, evidently, a specialized task of occupational therapists. See Mary Law & Lori Letts, A Critical Review of Scales of Activities of Daily Living, 43 Am. J. Occupational Therapy 522, 522 (Aug. 1989). But the record does not address nuances in how to assess and measure a person's ability to perform activities of daily living — particularly when the goal is not to assess needs for occupational therapy or care, but to assess the person's ability to commit crimes.

That statement was consistent with Dr. Perera's finding that F.E.D. "may need [a] walker or wheel chair [sic] when breathing pro[b]lems worsen." In short, the two physicians did not make the predicate findings for issuing the certificate of eligibility.

Dr. Soliman's testimony is no substitute for the physicians' diagnoses. The statute requires the department to issue a certificate of eligibility based on the two physicians' assessment. Although the statute does not preclude the medical director from reviewing the diagnoses and conveying them to the commissioner, the medical director is not the best witness to convey those diagnoses to the court.[19]

In sum, the certificate of eligibility was invalid because the physicians did not find that F.E.D. was "unable to perform activities of basic daily living." Without a valid certificate, the court lacked authority to consider release. N.J.S.A. 30:4-123.51e(f)(2). Therefore, the court correctly denied F.E.D.'s petition.[20]

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[19] Conceivably, the medical director's testimony may bear on other aspects of the statute. We shall not try to define the appropriate scope of such testimony here.

[20] The court did not address the other findings needed to conclude that a person has a "permanent physical incapacity": that the person requires "24-hour care" and that the condition did not exist at the time of sentencing. N.J.S.A. 30:4-123.51e(l). Therefore, we do not decide if Dr. Perera's

D.

Pressing beyond its non-eligibility finding, the trial court also rejected F.E.D.'s claim that his release conditions would not threaten public safety. We need not say if the court was correct on that issue; F.E.D.'s petition was not properly before the court in the first place. However, without mapping all of the statute's uncharted territory, we offer these limited observations.

Were we to review the trial court's public-safety decision, we would review it for an abuse of discretion. Like parole decisions, the court's decision to grant or deny compassionate release depends on "inherently imprecise" appraisals. See Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222 (2016). The predictive nature of the court's decision-making is also akin to pre-trial detention decisions, where a court must decide whether conditions could control the risk that a released arrestee would threaten safety, obstruct justice,

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statement that F.E.D. needed to be in the infirmary "due to diminished physical function" was equivalent to saying he needed "24-hour care," especially if life on a prison block requires "physical function" unlike life in other residential settings. Nor do we decide if Dr. Lynch addressed the twenty-four-hour-care requirement by stating that F.E.D. needed "[c]ontinued [h]ousing in the [i]nfirmary [u]nit," especially since Lynch's recommendation was due to F.E.D.'s "diminished ability in instrumental activities of daily living." As to whether the condition existed at the time of sentencing, the physicians ought to have addressed the issue, but did not. However, no one disputes that F.E.D.'s heart condition arose years after his sentencing as a thirty-three-year-old man.

or not appear — decisions we review for an abuse of discretion. State v. S.N., 231 N.J. 497, 515 (2018).

The statute, as noted, already specifies that a physically incapacitated inmate be physically incapable of committing a crime; the no-threat-to-public-safety requirement is an additional prerequisite that applies to physically incapacitated, but not terminally ill, inmates. Assuming that the no-threat-to-public-safety requirement is not mere surplusage, see Feuer v. Merck & Co., 455 N.J. Super. 69, 79 n.2 (App. Div. 2018), aff'd o.b., 238 N.J. 27 (2019), the statute contemplates that a person who is "physically incapable" of committing a crime may still pose a threat to public safety. How that is so, is not so clear. F.E.D. contends that, to avoid "preclud[ing] [all] inmate[s] from being released," the "physical[] incapab[ility]" standard should be read to encompass only crimes "requiring some level of physicality," and to exclude crimes like "downloading child pornography or mailing a bad check."[21] That, of course, would leave petitions by inmates who committed those latter two crimes as grist for the threat-to-public-safety mill. But it would also narrowly — perhaps too narrowly — construe the only test that applies to terminally ill inmates.

[21] It is unclear how this test would help F.E.D. If he is physically capable of eating with a knife or fork, he (presumably) is physically capable of criminally assaulting someone with it.

We are not convinced that the Legislature intended "physical[] incapab[ility]" to be so limited. First, the plain language of the statute does not support such a limitation. Second, the statute's legislative history reflects an intention to create a strict standard. The 1996 study commission that recommended the original medical-parole law, L. 1997, c. 214, contemplated parole for inmates who could "not physically pose a threat of committing another crime if released." Study Comm'n on Parole, Report of the Study Commission on Parole (1996) at 22-24 (emphasis removed). But the Legislature evidently went farther in requiring that inmates be "permanently physically incapable of committing a crime." A. L. & Pub. Safety Comm. Statement to A. Comm. Substitute for A. 22, at 1 (March 3, 1997).

Perhaps "physically incapable" refers to an inmate's personal, unassisted physical capacity to commit a crime. If so, persons who suffer from severe dementia or paralysis or otherwise lack control of muscular or neurological function may be "physically incapable" of using a computer or writing a bad check (as well as firing a weapon or stealing a car).[22] However, a person with quadriplegia, if communicative (though that requires some physicality, too),

[22] We acknowledge that this is a narrow group. One study contends that the "permanently medically incapacitated" standard is "unduly, and even cruelly, restrictive," and advocates for alternative criteria. Mary Price, Everywhere and Nowhere – Compassionate Release in the States 13, 16-20 (2018). However, it is not our role to alter the standard the Legislature has adopted.

could enlist another to commit a crime on his or her behalf. In such a case, the "threat to public safety" test may prove its worth. See In re Martinez, 148 Cal. Rptr. 3d 657, 675, 679 (Ct. App. 2012) (concluding that a quadriplegic inmate did not "reasonably pose a threat to public safety" and ordering parole board to release him on medical parole).

In any case, here, the trial court construed the "threat to public safety" strictly, noting that the statute omits the word "reasonable" — unlike the parole law, which refers to "a reasonable expectation" someone will violate parole, N.J.S.A. 30:4-123.53(a), or the Criminal Justice Reform Act, which refers to release conditions that "reasonably assure" public safety, N.J.S.A. 2A:162-19.

The California Court of Appeal, in construing its state's medical-parole law for physically incapacitated inmates, attached great importance to the presence of the word "reasonably." In re Martinez, 148 Cal. Rptr. 3d at 664-668. Unlike the New Jersey statute, the California law allows medical parole if the inmate does not "reasonably pose a threat to public safety." Cal. Penal Code § 3550 (Deering) (emphasis added). The Court of Appeal distinguished the medical-parole law from a law that did not use "reasonably" and that permitted resentencing of physically incapacitated inmates only if they posed no threat to public safety. In re Martinez, 148 Cal. Rptr. 3d at 664-668. The

court held that the quadriplegic medical-parole candidate did not reasonably pose a threat to public safety. He was unlikely to enlist others to commit crimes on his behalf, notwithstanding the parole board's fears that he would. So, the court held that he was entitled to medical parole. Id. at 673, 675, 679. See also Sarah L. Cooper & Cory Bernard, Medical Parole-Related Petitions in U.S. Courts: Support for Reforming Compassionate Release, 54 Creighton L. Rev. 173, 185-86 (2021) (reviewing Martinez and suggesting "that the assessment of a prisoner's risk to public safety should be nuanced and evidence-informed, reflecting that ill health likely lessens that risk").

These are knotty issues, to be sure. We defer deciding how much "physicality" is required to be "physically incapable of committing a crime," and how much "threat to public safety" is enough to bar compassionate release, to a case requiring those decisions.

E.

In sum, we affirm the trial court's order denying F.E.D.'s compassionate release. Although F.E.D.'s rehabilitation efforts are laudable and his medical condition serious, our role is to interpret the statute; we must affirm the decision below because the certificate of eligibility, which depended on medical diagnoses lacking essential findings, was invalid.

Affirmed.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy

973-854-1714
ashalom@aclu-nj.org

April 8, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-44-19 *State v. Mark Melvin* (083298),
Appellate Division Docket No. A-4632-17T5

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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Preliminary Statement

This case requires the Court to confront a rarely used sentencing practice that unconstitutionally depreciates the role of juries as fact finders. Generally, sentencing judges should consider all evidence of a defendant's conduct and character to develop a picture of the "whole person" in order to arrive at a just sentencing outcome. This case, however, compels the Court to ask what outer limits to that consideration exist. Are there circumstances where the tail of sentencing wags the dog of acquittal in a way that offends the State Constitution?

Amicus contends that where juries have been asked to consider particular conduct and have acquitted the defendant of that conduct, judges cannot disregard that jury determination and sentence the defendant (on other charges) as if he had, in fact, been convicted.

Amicus focuses on the negative impact that sentencing on acquitted conduct has on both a defendant's decision to proceed to trial and his or her subsequent strategy at trial. Although the State suggests that "whole person" sentencing is the norm throughout New Jersey, in fact, sentencing defendants based on acquitted conduct is actually quite rare. Indeed, it appears that the lion's share of this sentencing practice is limited to a single courtroom in a single county (Point I). Where defendants fear that they might be punished based on acquitted conduct, they are more likely to plead guilty than go to trial—even when they have

meritorious defenses—further driving down the already low rates of defendants exercising their right to a jury trial (Point II). Those defendants who do choose to go to trial in front of judges who are empowered to sentence based on acquitted conduct face the additional burden of having to persuade both the judge and the jury on two different standards of proof, thus compromising trial strategy (Point III).

These effects have a destabilizing effect on a defendant's right to a fair trial, are anathema to notions of due process, and chill a defendant's ability to present an adequate defense. Accordingly, this Court should create a bright line rule disallowing any consideration of acquitted conduct during the sentencing process.

Statement of Facts and Procedural History

Amicus accepts the statement of facts and procedural history contained within Defendant's Appellate Division brief. *Amicus* American Civil Liberties Union of New Jersey ("ACLU-NJ") also adopts the compelling arguments of Defendant about why this result is commanded by 1) the *Apprendi*-line of cases; 2) the doctrine of fundamental fairness; 3) principles of due process; and 4) the prohibition on double jeopardy.

Argument

Amicus suggests that this Court create a bright line rule allowing sentencing judges to consider the "whole person" at sentencing with one critical limitation: courts should not consider facts where the jury has acquitted a defendant of same or similar conduct.[1] That is, the Court should not adopt the practice seemingly approved in federal courts since the United States Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997) (finding that a jury's verdict of acquittal does not prevent a sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence).

Such rejection would not be novel. As the Michigan Supreme Court explained: "Five justices [of the United States Supreme Court] gave [*Watts*] side-eye treatment . . . and explicitly limited it to the double-jeopardy context." *People v. Beck*, 2019 Mich. LEXIS 1298, *17, 2019 WL 3422585 (Mich. 2019) (citing *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005)). Several other state courts have similarly prohibited consideration of acquitted conduct. *See State v. Marley*, 321 N.C. 415, 425 (N.C. 1988) (holding that due process and fundamental fairness

[1] Although not present in this case, the Court may also have to grapple with sentencing manipulation from prosecutors opting *not to charge* difficult-to-prove counts, only to ask a judge to use that conduct to aggravate a sentence. However, that is a problem for a different day.

preclude consideration of acquitted conduct); *State v. Cote*, 129 N.H. 358, 375 (N.H. 1987) (holding that the presumption of innocence is denied when a sentencing court uses charges that have resulted in acquittals to punish the defendant); *Beck*, 2019 Mich. LEXIS 1298, *2 ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."). Commentators too have expressed similar approbation, vociferously disparaging the *Watts* decision. *See, e.g.*, Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (describing critiques of *Watts*); Orhun Hakan Yalincak, *Critical Analysis Of Acquitted Conduct Sentencing In The U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" And "Pernicious"?*, 54 Santa Clara L. Rev. 675, 679-680 (2014) (same); Eang Ngov, *Judicial Nullification Of Juries: Use Of Acquitted Conduct At Sentencing*, 76 Tenn. L. Rev. 235, 261 (2009) (describing use of acquitted conduct as "nonsensical").

For its part, New Jersey does not take lightly the role of the jury and has " . . . upheld the importance of jury trials in constitutions that date back to the origins of our nation." *Williams v. American Auto Logistics*, 226 N.J. 117, 123 (2016) (citing *N.J. Const. art*. XXII (1776) ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); *N.J. Const. art.* I, § 7 (1844) ("The right of trial by jury shall remain

inviolate . . . ."); *N.J. Const. art*. I, ¶ 9 (1947) (same). To preserve that important role, the Court should prohibit the use of acquitted conduct in sentencing.

I. New Jersey judges rarely punish defendants for acquitted conduct.

It is axiomatic that uniformity in sentencing is a paramount goal of our Code of Criminal Justice. *State v. Roth*, 95 N.J. 334, 345 (1984). The Court has explained that "there can be no justice without a predictable degree of uniformity in sentencing." *State v. Hodge*, 95 N.J. 369, 379 (1984). Indeed, sentencing processes that "foster less arbitrary and more equal sentences" represent a "central theme" of New Jersey sentencing jurisprudence. *Roth*, 95 N.J. at 345. When some judges choose to aggravate defendants' sentences based on acquitted conduct and others do not, uniformity and predictability suffer.

The central question at issue in this case—whether a defendant can be sentenced based on conduct for which he has been acquitted—has rarely been considered by appellate courts in this state.[2] *State v. Tindell*, 417 N.J. Super. 530, 538 (App. Div. 2011) (considering trial court's imposition of five consecutive, maximum sentences where the judge determined that the jury erred in acquitting defendant on top charge); *see also State v. Paden-Battle*, App. Div. Docket No. A-

[2] The related question, whether a defendant can be sentenced based on conduct that a jury considered and upon which it could not reach a verdict, has also rarely been considered in New Jersey. *State v. Tillery*, 238 N.J. 293, 327 (2019) (holding that it was not error for a sentencing court to consider "evidence presented as to offenses on which the jury deadlocked").

001320-17 (pending appeal raising question of whether a defendant can be sentenced based on acquitted conduct); *State v. Allen*, 2016 N.J. Super. Unpub. LEXIS 689, *5 (App. Div. 2016) (ordering resentencing where judge sentenced a defendant acquitted of robbery but convicted of theft as if he had been convicted of robbery).[3]

In total, appellate courts have only considered five cases where judges have relied on facts upon which juries have either been hung or have voted to acquit. The same trial judge imposed sentence in three of them (*Melvin*, *Paden-Battle*, and *Tillery*). Indeed, those three cases appear to be the *only* ones where the trial court sought to justify the sentence by relying upon *Watts*. In the other two cases, the trial judges sought to sentence defendants whom the judges believed had "gotten away" with crimes; the courts did not seek to apply legal justifications for the sentences that reviewing courts appropriately found unlawful. In other words, it appears that statewide there is only one judge who sentences defendants on the belief that New Jersey law allows consideration of acquitted conduct. Accordingly, a rule prohibiting consideration of acquitted conduct would hardly impact sentencing practices throughout the state.

[3] Pursuant to *R.* 1:36-3, *amicus* attaches the unpublished opinion here as AA01-02. We are aware of no contrary precedent.

Even if that practice could be squared with the right to a jury trial, due process, fundamental fairness, prohibitions on double jeopardy, and good policy, the rarity of its use raises independent concerns. This Court and others have long recognized that "[r]andom and unpredictable sentencing is anathema to notions of due process." *State v. Moran*, 202 N.J. 311, 326 (2010). Indeed, "[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman v. Ga.*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Such arbitrary or capricious sentencing schemes violate the United States Constitution's prohibition on cruel and unusual punishment. *Id*. at 309 (Stewart, J., concurring) ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

Public confidence in the fairness of the criminal justice process suffers when defendants in one courtroom face different rules from those in every other courtroom in New Jersey; such confidence is fully assaulted when different rules are used by those who are should be seen as unbiased arbiters of justice.

II. Punishing defendants for acquitted conduct increases pressure on defendants to plead guilty.

As a result of, among other factors, harsh sentencing practices after trial, jury trials are increasingly rare; but if courts can punish defendants for conduct on which a jury votes to acquit, they will virtually disappear.

Of course, not every case should result in a trial. Plea bargaining is a necessary component of our criminal justice system. *State v. McQuaid*, 147 N.J. 464, 485-486 (1997). That is so because a "plea-bargain provides 'mutuality of advantage' to both the defendant and the State." *Id.* (internal citations omitted). Defendants "benefit[] by reducing [their] penal consequences and avoiding the public humiliation" associated with trials; "the State benefits by assuring that a guilty defendant is punished and by protecting valuable judicial and prosecutorial resources." *Id.*

A database maintained by the National Center on State Courts demonstrates that in New Jersey less than two percent of criminal cases end in a trial. Court Statistics Project, *Felony Jury Trials and Rates, New Jersey*, 2018 (noting that in 2018 of 44,251 dispositions, there were only 650 criminal jury trials and 106 criminal bench trials).[4]

Indeed, the expansion of the practice of plea bargaining has transformed the criminal justice system from a "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (finding also that in 2012, pleas made up

"[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, Litigation, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court."); George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 859 (2000) (plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

Even those who praise the "mutuality of advantage" that flows from plea bargaining must remain concerned about systems of resolving cases that encourage innocent people to plead guilty. Where prosecutors charge defendants with crimes that carry extremely serious sentences, the incentive to plead guilty – despite factual innocence – increases. *See*, *e.g.*, *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("prosecutorial overcharging []effectively compels an innocent defendant to avoid massive risk by pleading guilty"); Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 83-85 (2011); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014; Nat'l Ass'n of Crim. Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 6 (2018) (documenting so-called "trial taxes" imposed on defendants who exercise their right to a jury trial).

This temptation for innocent people to plead guilty reaches its apex where courts consider acquitted conduct at sentencing, creating a virtual "heads I win, tails you lose" scenario for a beleaguered defendant. By way of example: imagine a first-offender accused of having intercourse with a person who is under 16 years old. The victim alleges that the defendant was armed with a knife. As a result, the defendant is charged with first-degree aggravated sexual assault for the use of the knife and second-degree sexual assault based on the victim's age. Defendant is offered a plea bargain of eight years imprisonment. Defendant acknowledges having had intercourse with the victim, claiming that he reasonably believed that the victim was older, but denies having been armed or otherwise having used force or coercion.

In a system where acquitted conduct could not be used to elevate a sentence, the defendant would have to weigh the likelihood of conviction on only the second-degree charge (with a likely sentence closer to five years as a first offender who has a justification that fails to amount to a complete defense) against the probability of a conviction on the first-degree charge (with a probable sentence above ten years). On the other hand, if the court could consider acquitted conduct, the defendant would have to consider a third possibility: that the jury would acquit him of the higher charge, but the court would nonetheless determine, by a

preponderance of the evidence, that defendant was armed and sentence him to ten years.

Under this scenario, if the defendant submits to the State's aggressive offer and pleads guilty, he suffers. If he goes to trial and the jury convicts on the first-degree charges, he loses again. If he goes to trial and persuades a jury that he was not armed, he still comes out behind, so long as the State secures the conviction on a more easily proved offense—albeit, an admitted one—and persuades the sentencing judge of the defendant's guilt on the weapon-based charge by a preponderance of the evidence. Prosecutors are thus incentivized to charge defendants with certain unprovable counts where acquittal of other counts will serve merely as a "speed bump at sentencing." *United States v. Bell*, 808 F.3d 926, 929 (D.C. Cir. 2015) (Millett, J., concurring in the denial of rehearing *en banc*). Defendants, for their part, knowing that a partial acquittal will provide little sentencing relief, face additional increased pressure to plead guilty to weak allegations.

Sentencing defendants based on acquitted conduct coerces defendants to avoid trial or else subject themselves to lose-lose scenarios. Although our criminal justice system accepts, and even appreciates, plea bargaining, it loathes coercive practices that induce innocent people to plead guilty to crimes they did not commit. *Cf.* Diana Dabruzzo, Arnold Ventures, *New Jersey Set Out to Reform Its Cash Bail*

System. Now, the Results Are In. (Nov 14, 2019) (praising reform to pretrial system that reduced phenomenon of innocent defendants pleading guilty in exchange for time-served offers).[5] Without a bright line rule to avoid such outcomes, such inducement will encourage the very abuses recent reforms sought to curb.

III. Punishing defendants for acquitted conduct distorts trial strategy, forcing defendants simultaneously to influence two different decision makers.

Trial strategies that appeal to juries may not appeal to judges. Scalia & Garner, *Making Your Case: The Art of Persuading Judges*, 31 (2008) (explaining that a "jury argument" will "almost never" play well to a judge). So too in the other direction. Amsterdam & Hertz, *Trial Manual 6 for the Defense of Criminal Cases* 835 (6th Ed. 2016) (explaining that technical defenses, which might appeal to judges, cause jurors to lose focus and are therefore ineffective). In instances where courts allow the use of acquitted conduct in their sentencing decisions, attorneys must thus appeal to two decision makers whose interests are often contradictory and competing.

By way of example, the decision of whether or not a defendant should testify becomes particularly fraught where acquitted conduct can be considered. There is no doubt that "[t]he decision whether to testify, although ultimately defendant's, is

[5] Available at https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/.

an important strategic[] choice, made by defendant in consultation with counsel." *State v. Savage*, 120 N.J. 594, 631 (1990). But neither counsel nor the defendant can know what to do, where they must please two very different audiences. Many jurors want to hear from defendants because they "expect an innocent person to testify." Amsterdam & Hertz at 834. But judges, who are less likely to draw improper adverse inferences from a defendant's election not to testify, may be more "skeptical of the testimony of the defendant . . . ." *Id.* at 832. Where a defendant must simultaneously convince both the jury and the judge of his innocence, a difficult decision becomes even harder.

Similarly, defendants must think twice about employing a trial defense that relies simply on holding the State to its burden. To do so risks signaling to a judge that the defendant likely committed the alleged crime and escaped culpability only because of the high standard of proof. Perverse results flow where a defendant's "largely successful effort to escape guilt beyond a reasonable doubt [does] not preclude, and, in its success, actually might . . . contribute[] to, his punishment for those acquitted offenses under a lesser standard of proof . . . ." *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring).

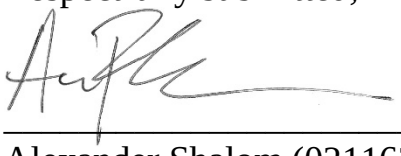
Put simply, trying a criminal case is difficult enough; forcing defense attorneys to satisfy two fact-finders, with two different viewpoints, and subject to two different standards of proof makes task almost insurmountable.

Conclusion

A sentence based upon conduct for which a jury had voted to acquit strains public respect for the jury system, indeed for the integrity of the entire criminal justice system. *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (Kavanaugh, J.). Lay people "would undoubtedly be revolted by the idea" that a defendant could be penalized for conduct for which they were never found to be guilty. *United States v. Coleman*, 370 F. Supp. 2d 661, 671 (S.D. Ohio), *rev'd on other grounds by United States v. Kaminski*, 501 F. 3d 644 (6th Cir. 2007). Sentencing based on acquitted conduct harms uniformity, pressures defendants to plead guilty, and compromises trial strategy. It is a practice unworthy of use in our courts.

As a result, this Court should reverse the judgement of the Appellate Division and either resentence Defendant without consideration of the murder for which he was acquitted or remand the case for resentencing under the same terms.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
Karen Thompson
American Civil Liberties Union
of New Jersey Foundation

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
New Jersey

P.O. Box 32159
Newark, NJ 07102

Tel: 973-642-2086
Fax: 973-642-6523

info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney

973-854-1714
ashalom@aclu-nj.org

December 14, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-13-30, State v. Michelle Paden-Battle (084603),
Appellate Division Docket # A-001320-17

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

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Appendix

Preliminary Statement

This case requires the Court to confront a rarely used sentencing practice that unconstitutionally depreciates the role of juries as factfinders. Generally, sentencing judges should consider all evidence of a defendant's conduct and character to develop a picture of the "whole person" in order to arrive at a just sentencing outcome. This case, however, compels the Court to probe and define the outer limits of that consideration. Are there circumstances where the tail of sentencing wags the dog of acquittal in a way that offends the State Constitution?

Amicus American Civil Liberties Union of New Jersey contends that where juries have been asked to consider particular conduct and have acquitted the defendant of that conduct, judges cannot disregard the jury's determination and sentence the defendant as if he had been convicted on the acquitted charges.

In this brief, *amicus* summarizes why this result is commanded by: 1) the *Apprendi* line of cases, 2) principles of due process, and 3) the doctrine of fundamental fairness (Point I). *Amicus* then focuses on the rarity of the consideration of acquitted conduct in sentencing (Point II). *Amicus* relies on its brief in *State v. Melvin*, (A-44-19, Docket No. 083298), for a discussion of the impact of this practice on defendants' decisions to proceed to trial and their strategies at trial.

Statement of Facts and Procedural History

Amicus accepts the statement of facts and procedural history contained within Defendant's Appellate Division brief. In a published opinion, the Appellate Division affirmed Defendant's conviction (other than converting the first-degree kidnapping charge to a second-degree one), but vacated the sentence and ordered a remand for resentencing before a different judge. *State v. Paden-Battle*, 464 N.J. Super. 125 (App. Div. 2020).

Argument

I. Punishing defendants for acquitted conduct undermines the import of jury verdicts, deprives defendants of due process, and is fundamentally unfair.

Limiting the use of acquitted conduct at sentencing does not end the practice that allows sentencing judges to consider the "whole person" at sentencing; it simply imposes a critical limitation upon it. The destabilizing effect of considering acquitted conduct strips a defendant of the right to a fair trial, is anathema to basic notions of due process, and chills a defendant's ability to present an adequate defense. Accordingly, this Court should create a bright line rule disallowing the consideration of acquitted conduct in sentencing.

A. Punishing defendants for acquitted conduct depreciates the significance of jury verdicts.

New Jersey does not take lightly the role of the jury: "New Jersey has upheld the importance of jury trials in constitutions that date back to the origins of

our nation." *Williams v. American Auto Logistics*, 226 N.J. 117, 123 (2016) (citing *N.J. Const. art*. XXII (1776) ("[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."); *N.J. Const. art.* I, § 7 (1844) ("The right of trial by jury shall remain inviolate . . . ."); *N.J. Const. art*. I, ¶ 9 (1947) (same). To preserve that important role, the Court should prohibit the use of acquitted conduct in sentencing.

An acquittal is the most sacred part of a jury verdict, " . . . represent[ing] the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager v. United States*, 557 U.S. 110, 122 (2009). No matter how much a judge may disagree with an acquittal, "its finality is unassailable." *Id.* at 123. Lay juries, then, "guard against a spirit of oppression and tyranny on the part of rulers." *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995). A judge's disagreement with a jury's verdict makes it even more important to protect that verdict. "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).

Punishing a defendant for acquitted conduct not only violates the protection an acquittal affords, but undermines the very point of the right to trial by jury: to protect the defendant from government overreach. Where a judge disagrees with

the jury's verdict and punishes the defendant on that basis, the court disrespects the jury's function and judgment. Here, Defendant was made to answer at sentencing for acquitted crimes, thus gutting the "special significance" of the acquittal. *United States v. Scott*, 437 U.S. 82, 91 (1978).

Apprendi v. New Jersey and its progeny articulate how the right to a trial by jury must be implemented. 530 U.S. 466 (2000). In *Apprendi*, the United States Supreme Court held that unless admitted by the defendant, findings of fact that increase the range of punishment for a given crime must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 490. Accordingly, any judicial factfinding[1] increasing a defendant's sentence violates the Sixth and Fourteenth Amendments. *Ibid.*

The trial court in the instant case justified Defendant's sentence by *judicial* factfinding — that she was the ringleader who caused the murders to happen — not by facts found by the jury and proven beyond a reasonable doubt. That Defendant's sentence was within the statutory range does not remove it from *Apprendi*'s reach; the United States Supreme Court made clear that the relevant maximum is not what is technically statutorily allowed for a specific type of felony, but what is allowed by the actual jury finding. *Blakely v. Washington*, 542

[1] There exists a limited exception, not applicable here, for factfinding related to a defendant's criminal history. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

U.S. 296, 299 (2004). Put differently, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without any additional findings*." *Id.* at 303-304 (emphasis added). The question thus becomes: could the extraordinary sentence Defendant received have been justified had the trial court accepted the jury's determination that she participated in, but did not spearhead, the crime? It is hard to imagine sentencing a defendant — who had never been to state prison and not been convicted of any crime in more than fifteen years — to sixty years in prison *unless* the court determined she was the ringleader in the murder. The sentence thus violates *Apprendi* and the Sixth Amendment demands that the Defendant be resentenced.

B. Punishing defendants for acquitted conduct violates due process and is fundamentally unfair.

Sentencing based on acquitted conduct also violates the United States and New Jersey Constitutions' guarantees of due process and the doctrine of fundamental fairness, which can be "viewed as an integral part of the right to due process" or as a "penumbral right reasonably extrapolated from other specific constitutional guarantees." *State v. Abbati*, 99 N.J. 418, 430 (1985). Fundamental fairness requires that government action comport with "commonly accepted standards of decency." *State v. Talbot*, 71 N.J. 160, 186 (1976). Such decency is not evident here, and the practice should be eliminated.

One of the core components of due process is that the State must prove a defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363-64 (1970). The enforcement of the presumption of innocence "lies at the foundation of the administration of our criminal law." *Id.* at 363 (internal quotation marks omitted). As the Michigan Supreme Court explained, "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." *People v. Beck*, 504 Mich. 605, 626 (Mich. 2019). Therefore, to allow the trial court to use at sentencing "an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *State v. Marley*, 364 S.E.2d 133, 139 (N.C. 1988).

New Jersey would not be alone in prohibiting consideration of acquitted conduct as a violation of due process and as fundamentally unfair as several state courts have already done so. *See Beck*, 504 Mich. at 609 ("Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime."); *State v. Marley*, 321 N.C. 415, 425 (N.C. 1988) (holding that due process and fundamental fairness preclude consideration of acquitted conduct); *State v. Cote*, 129 N.H. 358, 375 (N.H. 1987) (holding that the

presumption of innocence is denied when a sentencing court uses charges that have resulted in acquittals to punish the defendant).

Indeed, judges across the country have noted that using acquitted conduct at sentencing erodes the public trust in our legal system because the corrosive effect of sentencing based on acquitted conduct is perceived as fundamentally unfair. *See United States v Brown*, 892 F.3d 385, 408 (D.C. 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing *en banc*) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Canania*, 532 F.3d 764, 778 & n.4 (8th Cir. 2008) (Bright, J., concurring) (quoting a letter from a juror as evidence that the use of acquitted conduct is perceived as unfair and "wonder[ing] what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v. Coleman*, 370 F. Supp. 2d 661, 671 n.14 (S.D. Ohio 2005) ("A layperson would undoubtedly be revolted by the idea that, for example, a 'person's sentence

for crimes of which he has been convicted may be multiplied fourfold by taking into account conduct of which he has been acquitted.'").[2]

In federal courts, the consideration of acquitted conduct found seeming approval from the United States Supreme Court's decision in *United States v. Watts*, 519 U.S. 148 (1997). But rejecting *Watts* hardly requires rejection of well-established Supreme Court precedent. As the Michigan Supreme Court explained: "Five justices [of the United States Supreme Court] gave [*Watts*] side-eye treatment . . . and explicitly limited it to the double-jeopardy context." *Beck*, 504 Mich. at 624 (citing *United States v. Booker*, 543 U.S. 220, 240 n.4 (2005)). In the more than two decades since the United States Supreme Court decided *Watts*, no New Jersey Supreme Court or published Appellate Division opinion in New Jersey has explicitly endorsed its holding.

In one unpublished case from a decade ago, an Appellate Division panel appeared to allow the use of acquitted conduct. *State v. Van Hise*, 2010 N.J. Super.

[2] Commentators have also criticized the use of acquitted conduct in sentencing. *See, e.g.*, James J. Bilsborrow, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 Wm. & Mary L. Rev. 289, 333 (2007); Barry L. Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can Be Done About It*, 49 Suffolk U. L. Rev. 1, 26 (2016); Orhun Hakan Yalincak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L. Rev. 675, 723 (2014).

Unpub. LEXIS 1513, *12-13 (App. Div. 2010).[3] But, in *State v. Sainz*, this Court made clear that "when the court goes beyond defendant's admission or factual version[,]" 107 *N.J.* 283, 293 (1987), it must be vigilant to ensure that it does "not sentence defendant for a crime that is not fairly embraced by the guilty plea." *Id.* *See also State v. Fuentes*, 217 *N.J.* 58, 71 (2014) (warning that courts "must be careful not to impose a sentence for an offense beyond the scope of the plea).

In *State v. Bomani*, 2014 *N.J. Super.* Unpub. LEXIS 415 (App. Div. 2014), another unpublished Appellate Division case, the court cautioned "the court may not increase a defendant's sentence for crimes or wrongs that have not been proven and that are not part of the charges on which defendant stands convicted." *Id.* at *41.[4] In short, even if *Watts* remains good law, New Jersey courts have not accepted its proposition that acquitted conduct may be considered in sentencing under our own State Constitution.

II. New Jersey judges rarely punish defendants for acquitted conduct.

It is axiomatic that uniformity in sentencing is a paramount goal of our Code of Criminal Justice. *State v. Roth*, 95 N.J. 334, 345 (1984). The Court has explained that "there can be no justice without a predictable degree of uniformity

[3] Pursuant to *R.* 1:36-3, this opinion is included in an appendix as AA01-05. Counsel cites cases below that stand for the contrary proposition.

[4] Pursuant to *R.* 1:36-3, this opinion is included in an appendix as AA06-16. Counsel is aware of no case, other than *Van Hise*, that stands for the contrary proposition.

in sentencing." *State v. Hodge*, 95 N.J. 369, 379 (1984). Indeed, sentencing processes that "foster less arbitrary and more equal sentences" represent a "central theme" of New Jersey sentencing jurisprudence. *Roth*, 95 N.J. at 345. When some judges choose to aggravate defendants' sentences based on acquitted conduct and others do not, uniformity and predictability suffer.

The question at issue in this case — whether a defendant can be sentenced based on conduct for which he has been acquitted — has rarely been considered by appellate courts in this state.[5] *State v. Tindell*, 417 N.J. Super. 530, 538 (App. Div. 2011) (considering trial court's imposition of five consecutive, maximum sentences where the judge determined that the jury erred in acquitting defendant on top charge); *see also State v. Melvin*, 2020 N.J. LEXIS 145, 2020 WL 589570 (2020) (appeal pending raising question of whether a defendant can be sentenced based on acquitted conduct); *State v. Allen*, 2016 N.J. Super. Unpub. LEXIS 689, *5 (App. Div. 2016)[6] (ordering resentencing where judge sentenced a defendant acquitted of robbery but convicted of theft as if he had been convicted of robbery); *Van Hise*, Docket No. A-2115-07 (allowing consideration of defendant's acquittal

[5] The related question, whether a defendant can be sentenced based on conduct that a jury considered and upon which it could not reach a verdict, has also rarely been considered in New Jersey. *State v. Tillery*, 238 N.J. 293, 327 (2019) (holding that it was not error for a sentencing court to consider "evidence presented as to offenses on which the jury deadlocked").

[6] Pursuant to *R.* 1:36-3, *amicus* attaches the unpublished opinion here as AA17-18. We are aware of no contrary precedent.

on charges of terroristic threats in setting aggravating and mitigating factors for conviction for aggravated assault).

The Attorney General identifies 11 other cases in the last 14 years where this issue has been raised. *See* AGBr 7-8[7] (citing *State v. Widener*, Docket No. A-4140-17 (App. Div. Jan. 15, 2020) (AGa16 to 39) (addressing issue of inconsistent verdicts); *State v. Daniels*, Docket No. A-5223-14 (App. Div. Mar. 4, 2019) (AGa40 to 52) (finding that simple presence at scene of gang-related murder was sufficient to support aggravating factor 5); *State v. Pittman*, Docket No. A-4600-16 (App. Div. Sep. 21, 2018) (AGa53 to 63) (holding that determination of aggravating and mitigating factors was based solely on defendant's criminal record); *State v. Mallard*, Docket No. A-4703-13 (App. Div. May 15, 2017) (AGa64 to 77) (rejecting without discussion claim that judge relied on acquitted conduct); *State v. Roy*, Docket No. A-3246-13 (App. Div. May 23, 2016) (AGa78 to 95) (remanding for a new restitution hearing because, among other reasons, court did not make finding that defendant caused injuries);[8] *State v. Bonilla*, Docket No. A-1079-11 (App. Div. Aug. 6, 2013) (AGa96 to 118) (finding, without

[7] AGBr refers to the Attorney General's Appellate Division Brief; AGa refers to the Appendix to the Attorney General's Appellate Division Brief.

[8] In *Roy*, the court reversed a restitution order for a defendant convicted of resisting arrest because, among other problems, the court did not make a finding that the defendant assaulted the officer. The court noted that such a finding was particularly required because the defendant had been acquitted of the assault.

discussion, that aggravating and mitigating factors were supported in the record); *State v. Silvi*, Docket No. A-3905-10 (App. Div. May 17, 2013) (AGa119 to 146) (addressing issue of inconsistent verdicts); *State v. Hayes*, Docket No. A-4984-10 (App. Div. Apr. 15, 2013) (AGa147 to 155) (rejecting claim that judge considered acquitted conduct); *State v. Thomas*, Docket No. A-5415-07 (App. Div. Aug. 2, 2010) (AGa156 to 176) (same); *State v. Lucas*, Docket No. A-0564-06 (App. Div. Dec. 28, 2007) (AGa177 to 184) (finding aggravating factors supported by quantity of drugs and defendant's criminal record); *State v. St. Preux*, Docket No. A-3835-04 (App. Div. Oct. 11, 2006) (AGa185 to 188) (addressing role of inconsistent verdicts in Graves Act sentencing)).

Those cases are distinguishable, though, because in *none* of those cases did the reviewing court hold that the trial court had, in fact, considered the acquitted conduct. Where a defendant raises an issue on appeal, and the court finds it does not exist, it cannot serve as evidence that the practice is widespread. In total, appellate courts have considered (or are considering) only six cases where judges have actually relied upon facts upon which juries have either been hung or have voted to acquit. The same trial judge imposed sentences in three of them (*Melvin*, *Paden-Battle*, and *Tillery*). Indeed, those three cases appear to be the *only* ones where the trial court sought to justify the sentence by relying upon *Watts*. In two of the other cases, the trial judges sought to sentence defendants whom the judges

believed had "gotten away" with crimes; the courts did not seek to apply a legal justification for the sentences that reviewing courts appropriately found unlawful. *See Allen*, 2016 N.J. Super. Unpub. LEXIS 689, *3-5; *Tindell*, 417 N.J. Super. at 538. In other words, it appears that statewide there is only one judge who sentences defendants on the belief that New Jersey law allows consideration of acquitted conduct.

Even if that practice could be squared with the right to a jury trial, due process, fundamental fairness, and good policy, the rarity of its use raises independent concerns. "Random and unpredictable sentencing is anathema to notions of due process." *State v. Moran*, 202 N.J. 311, 326 (2010). Indeed, "[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Arbitrary or capricious sentencing schemes violate the United States Constitution's prohibition on cruel and unusual punishment. *Id*. at 309 (Stewart, J., concurring) ("death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual").

Public confidence in the fairness of the criminal justice process suffers when defendants in one courtroom face different rules from those in every other courtroom in New Jersey.

Conclusion

Sentencing based on acquitted conduct undermines the role of juries, violates due process, is fundamentally unfair, and harms uniformity. As a result, this Court should remand for resentencing and create a bright line rule that such practices are fully disallowed.

Respectfully submitted,

Alexander Shalom (021162004)
Jeanne LoCicero

Amicus’s Appendix

State v. Van Hise

Superior Court of New Jersey, Appellate Division

March 23, 2010, Submitted; July 9, 2010, Decided

DOCKET NO. A-2115-07T4

Reporter
2010 N.J. Super. Unpub. LEXIS 1513 *; 2010 WL 2696835

STATE OF NEW JERSEY, Plaintiff-Respondent, v. RICHARD T. ***VAN HISE***, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 06-08-1256.

Core Terms

sentencing, mitigating factors, intoxication, trial court, resisting arrest, aggravated assault, knowingly, police officer, aggravating, convictions, acquitted, kicked, defendant's conduct, terroristic threat, state of mind, reasons

Counsel: Yvonne Smith Segars, Public Defender, attorney for appellant (Carolyn V. Bostic, Designated Counsel, of counsel and on the brief).

Robert D. Bernardi, Burlington County Prosecutor, attorney for respondent (Stephen E. Raymond, Assistant Prosecutor, of counsel and on the brief).

Judges: Before Judges Parrillo, Lihotz and Ashrafi.

Opinion

PER CURIAM

Defendant Richard ***Van Hise*** appeals from his conviction and sentence for resisting arrest and assaulting a police officer. We affirm.

Defendant was indicted on five third-degree charges: (1) aggravated assault of his wife, *N.J.S.A. 2C:12-1(b)(7)*; (2) aggravated assault of a police officer with injury inflicted, *N.J.S.A. 2C:12-1(b)(5)(a)*; (3) criminal restraint of his wife, *N.J.S.A. 2C:13-2(a)*; (4) resisting arrest, *N.J.S.A. 2C:29-2(a)(3)(a)*; and (5) making a terroristic threat, *N.J.S.A. 2C:12-3(a)*.

From the evidence at trial, the jury could find the following facts. On March 16, 2006, Florence Township police responded several times to defendant's home to investigate noise complaints. At 9:10 p.m., the police spoke to defendant's wife and left. Twenty minutes later, they **[*2]** received another noise complaint.

Officers James Ford and Mauro Correnti arrived at defendant's home on the second complaint at 9:45 p.m. They heard yelling and screaming from an upstairs window. Then they saw defendant's wife run out the back door "out of control" and without clothes. Defendant, also naked, went after his wife and pulled her back into the house. As the officers got to the door, they saw defendant's wife on the floor on her back and defendant straddled on top of her with one hand over her mouth and the other on her throat or upper chest pinning her down. The police ordered defendant to get off his wife several times, but defendant did not comply. The officers then pulled defendant off and attempted to arrest him.

Defendant physically resisted the officers' attempts to handcuff him by stiffening his arms and refusing to put them behind his back, and a scuffle ensued in the kitchen. After

being forcibly handcuffed, defendant continued to yell, curse, and scream, and he kicked one of the officers in the groin. The officers threw him to the ground, and he struggled and kicked his legs while they subdued him.

The officers took defendant outside, but he became combative again **[*3]** and fought their attempts to seat him in a police car. He kicked an officer again and continued verbally berating the officers. Inside the police car, defendant ranted and flailed about and eventually kicked out a side window.

While being processed at the police station and transported to county jail, defendant made verbal threats, including a threat to kill one of the officers after his release from custody. A few minutes after that threat, defendant apologized and said he did not mean it.

Video recordings from the dashboards of the police cars, and audio recordings made from the officers' communication devices, were used in examination of the officers and played for the jury. The State also introduced in evidence photographs of defendant's wife taken the day after the arrest displaying injury to her face. However, defendant's wife refused to testify or otherwise cooperate with the police.

Defendant testified in his defense. He said on the date of the incident, his wife called him at work extremely upset and said that DYFS (the Division of Youth and Family Services) had just removed their two children from their home. Defendant went home immediately and, over the next two hours, drank **[*4]** a bottle and a half of tequila with his wife. When the police came to his home a second time, his wife suddenly ran outside. He followed and pulled her back into the house because he did not want her to be arrested. He testified he was highly intoxicated at the time of the incident and had no recollection of resisting arrest, kicking the officer, or making a verbal threat.

At the close of evidence, the court granted defendant's motion to dismiss the third count, criminal restraint of the wife, on the ground that the State had not presented sufficient evidence for it to be considered by the jury. The court denied defendant's motion to dismiss other counts.

The jury acquitted defendant of aggravated assault of his wife and making a terroristic threat against a police officer. It found him guilty on count four, third-degree resisting arrest, and a lesser-included offense under count two, fourth-degree aggravated assault of a police officer without injury. The court sentenced defendant to five years in prison with two years without parole eligibility on the charge of resisting arrest and a concurrent term of eighteen months in prison on the charge of aggravated assault.

On appeal, defendant **[*5]** argues the following points:

> POINT I DEFENDANT'S CONVICTIONS FOR AGGRAVATED
> ASSAULT OF A LAW ENFORCEMENT OFFICER AND RESISTING ARREST ARE AGAINST THE WEIGHT OF THE EVIDENCE AND MUST BE REVERSED BECAUSE THE DEFENDANT'S INTOXICATION NEGATED ANY INTENT TO CAUSE BODILY INJURY TO OFFICER CORRENTI OR TO RESIST ARREST (Not Raised
> Below).
> POINT II THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO THE AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER AND RESISTING ARREST CHARGES.
> POINT III DEFENDANT'S SENTENCE IS MANIFESTLY EXCESSIVE.
> POINT IV THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO REDACT THE PRESENTENCE REPORT TO EXCLUDE INFORMATION REGARDING THE TERRORISTIC THREATS FOR WHICH DEFENDANT WAS ACQUITTED.
>
> POINT V THE ISSUES RAISED IN DEFENDANT'S *PRO SE* BRIEF, IF ANY, SUPPORT HIS REQUEST FOR A REVERSAL OF HIS CONVICTION AND SENTENCE. [1]

We reject Point I, the convictions being against the weight of the evidence, because defendant did not make a motion for a new trial after the jury's verdict. Under *Rule 2:10-1*, "the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal **[*6]** unless a motion for a new trial on that ground was made in the trial court." *See State v. Herrera, 385 N.J. Super. 486, 492, 897 A.2d 1085 (App. Div. 2006)*; *State v. Soto, 340 N.J. Super. 47, 73, 773 A.2d 739 (App. Div.), certif. denied, 170 N.J. 209, 785 A.2d 438 (2001)*; *State v. Saunders, 302 N.J. Super. 509, 524, 695 A.2d 722 (App. Div.), certif. denied, 151 N.J. 470, 700 A.2d 881 (1997)*; *State v. Perry, 128 N.J. Super. 188, 190, 319 A.2d 505 (App. Div. 1973)*, aff'd, *65 N.J. 45, 319 A.2d 474 (1974)*. Furthermore, the merits of that issue do not warrant reversal for the same reasons that we reject defendant's Point II, arguing that he was entitled to a judgment of acquittal.

Defendant contends the undisputed evidence established his high state of intoxication and no rational jury could conclude that he had the requisite state of mind for conviction of the crimes charged. We disagree.

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[1] We have not received a pro se brief.

On a motion for a judgment of acquittal:

> the trial judge must determine . . . whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.
>
> [*State v. Reyes, 50 N.J. 454, 458-59, 236 A.2d 385 (1967)*.]

On **[*7]** appeal, we apply the same standard of review. *State v. Spivey, 179 N.J. 229, 236, 844 A.2d 512 (2004)*; *State v. Josephs, 174 N.J. 44, 81, 803 A.2d 1074 (2002)*; *State v. Moffa, 42 N.J. 258, 263, 200 A.2d 108 (1964)*. In this case, there was sufficient evidence to prove beyond a reasonable doubt that defendant had the requisite state of mind for conviction.

We start with settled law that voluntary intoxication is not a defense to a criminal charge unless it negates an element of the offense. *N.J.S.A. 2C:2-8(a)*; *State v. Cameron, 104 N.J. 42, 51, 514 A.2d 1302 (1986)*. The charge of aggravated assault upon a police officer, *N.J.S.A. 2C:12-1(b)(5)(a)*, requires that defendant have acted purposely or knowingly. The charge of resisting arrest, *N.J.S.A. 2C:29-2(a)*, requires that defendant have acted purposely. In this case, the trial court correctly instructed the jury on the statutory definitions of purposely and knowingly under *N.J.S.A. 2C:2-2(b)*. The court also instructed the jury that the State had the burden of proof on the state of mind element of each offense and that the jury could take into consideration defendant's intoxication in evaluating proof of his state of mind.

In *Cameron, supra, 104 N.J. at 53-56*, the Court discussed the level of intoxication **[*8]** necessary to find that a defendant lacked the ability to act purposely and knowingly. Citing the history of the defense of intoxication through earlier case law, the Court confirmed "prostration of faculties" as the familiar "shorthand expression" to describe the defense and the degree of intoxication that would negate the requisite state of mind. *Id. at 56*. Here, the trial court's charge to the jury followed the dictates of *Cameron*.

The court instructed the jury:

> You may consider the evidence as to the defendant's consumption of alcoholic beverages in determining whether he was intoxicated to such a degree that he was incapable of acting purposely or knowingly. Therefore, once there is some evidence of defendant's intoxication, the State must prove beyond a reasonable doubt that such intoxication did not render the defendant incapable of acting purposely or knowingly.
>
> . . . .
>
> In considering the question of intoxication, you should carefully distinguish between the condition of mind which is merely excited by intoxicating drink and yet capable of acting with purpose or knowledge as opposed to the condition in which one's mental faculties are so overcome as to deprive one of his will to **[*9]** act and ability to reason thereby rendering a person incapable of acting and thus preventing the person from committing the crime charged with the mental state required of either purposely or knowingly.
>
> . . . .
>
> If after considering all the evidence you have a reasonable doubt whether defendant's intoxication was such as to render him incapable of acting purposely or knowingly, you must acquit him of any or more [sic] of those crimes that require either purposeful or knowing action.

Defendant does not allege error in the charge but contends that a rational jury could only conclude from the evidence that defendant did not act purposely or knowingly in kicking the officer or resisting arrest.

The jury heard the testimony of the officers and defendant and also viewed and heard recordings of some of defendant's actions. Defendant testified that he was highly intoxicated but did not present any medical or similar testimony to establish the degree of his intoxication. It was also apparent from the evidence at trial that defendant was sufficiently aware of what was occurring to remember the reason for his drinking, his annoyance at the police for coming to his home, and the reason for going after **[*10]** his wife and pulling her back into the house. At sentencing, the trial court commented that defendant's memory seemed to lapse only when he could not excuse or explain his actions.

The jury could infer from all the evidence that defendant acted purposely in resisting the officers' attempts to arrest and transport him and that he kicked one of the officers two or three times with intent to cause injury to the officer. We reject defendant's argument that he was entitled to a judgment of acquittal because of his intoxication.

Defendant also challenges his sentence as excessive. He alleges the trial court punished him for rejecting the State's plea offer and electing to stand trial, the trial court violated his rights by considering evidence that he made a terroristic threat to kill one of the officers even though he was acquitted of that charge, and the court erroneously refused to apply certain mitigating factors that should have reduced the severity of his

sentence.

Our review of a sentencing decision can involve three types of issues: (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors **[*11]** found by the sentencing court were based on competent credible evidence in the record; and (3) whether the sentence was nevertheless "clearly unreasonable so as to shock the judicial conscience." *State v. Roth, 95 N.J. 334, 364-66, 471 A.2d 370 (1984)*; *accord State v. Carey, 168 N.J. 413, 430, 775 A.2d 495 (2001)*; *State v. Roach, 146 N.J. 208, 230, 680 A.2d 634, cert. denied, 519 U.S. 1021, 117 S. Ct. 540, 136 L. Ed. 2d 424 (1996)*. We do not substitute our judgment regarding an appropriate sentence for that of the trial court. *Roth, supra, 95 N.J. at 365*.

We reject defendant's argument that the trial court imposed a more severe sentence on defendant because he exercised his constitutional right to stand trial. At the sentencing hearing, the court used the word "bonus" in reference to the State's four-year plea offer, but that comment was in response to defense counsel's argument that the plea offer implied defendant's sentence should not be greater. The court did not punish defendant for standing trial by sentencing him to five years with a two-year period of parole ineligibility. In fact, the court indicated the reason for the five-year sentence was that defendant had been sentenced to four years' imprisonment for similar **[*12]** crimes in 2001, and it was appropriate to sentence him to a longer term for a repeat offense. That decision of the trial court was not error and not an abuse of the court's sentencing discretion.

Next, defendant argues that the court erred in taking into consideration and refusing to delete from the presentence investigation report facts regarding the charge of terroristic threats, on which he was acquitted by the jury. We find no error.

The presentence report contained a narrative of the offense circumstances including allegations of threats defendant made to the police officers. In response to defense counsel's application at the sentencing hearing that those allegations be deleted because the jury acquitted him of count five, the court stated:

> [H]e was not convicted of these things. He was not convicted of any crime for having done those things, but I saw with my own eyes and I heard with my own ears the things that he was doing and saying.
>
> And I think for purposes of my making a determination as to an appropriate sentence on these two charges which involve his relating to police officers, I think that what happened as the events continue to unfold is highly relevant to my making an **[*13]** appropriate determination.
>
> Now, I will put on the record that I am not in any way treating those facts as convictions of anything because they are not convictions. But I think it -- I think those events help to place -- help to create an entire context for this case.

In effect, the court stated that defendant's conduct, which was recorded and witnessed directly by the court, was relevant to determining his intent and purpose in resisting arrest and assaulting an officer. It was also relevant to application of aggravating and mitigating factors under *N.J.S.A. 2C:44-1*. Defendant was not penalized for making a threat against an officer, the charge of which he was acquitted. Had that charge never been brought, the information directly observed by the sentencing judge would have been relevant and admissible on the issue of an appropriate sentence on the charges of resisting arrest and aggravated assault.

With respect to the court's balancing of aggravating and mitigating factors, the court found applicable three aggravating factors: the risk that defendant will commit another offense, *N.J.S.A. 2C:44-1(a)(3)*; the extent of defendant's criminal record, *N.J.S.A. 2C:44-1(a)(6)*; and the need to deter **[*14]** defendant and others from violating the law, *N.J.S.A. 2C:44-1(a)(9)*. Defendant's prior record showed three indictable convictions, including for similar offenses as in this case, and eight municipal court convictions. That record amply supported the sentencing court's findings as to aggravating factors.

The court found mitigating factor eleven applicable, that defendant's imprisonment would cause hardship to his children, *N.J.S.A. 2C:44-1(b)(11)*, because the children would be deprived of defendant's employment income and financial support as a result of his imprisonment. Defendant argues that the court erred in failing to find mitigating factors one, three, four, eight, and nine applicable. *N.J.S.A. 2C:44-1(b)(1)*, *(3)*, *(4)*, *(8)*, and *(9)*.

A sentencing court is not required to reject explicitly "each and every mitigating factor argued by a defendant." *State v. Bieniek, 200 N.J. 601, 608-09, 985 A.2d 1251 (2010)*. "It is sufficient that the trial court provides reasons for imposing its sentence that reveal the court's consideration of all applicable mitigating factors in reaching its sentencing decision." *Ibid.* (citing *State v. Pillot, 115 N.J. 558, 565-66, 560 A.2d 634 (1989)*). In this case, the trial court expressly stated **[*15]** its reasons for rejecting most of the mitigating factors argued by

defendant. [2]

Mitigating factor one, that defendant's conduct did not cause or threaten serious harm, *N.J.S.A. 2C:44-1(b)(1)*, was rejected because the grading of the offenses of conviction did not anticipate more serious harm than actually occurred or was threatened by defendant's conduct. Mitigating factor three, that defendant acted under strong provocation, *N.J.S.A. 2C:44-1(b)(3)*, was properly rejected because neither the police nor DYFS had provoked defendant into his criminal conduct.

Mitigating factor four was also inapplicable, that substantial grounds existed to excuse or justify defendant's conduct, *N.J.S.A. 2C:44-1(b)(4)*. Intoxication is generally not available as a mitigating factor. *See State v. Deluca, 325 N.J. Super. 376, 392, 739 A.2d 455 (App. Div. 1999)*, *aff'd* ***[*16]*** *as modified*, *168 N.J. 626, 775 A.2d 1284 (2001)*; *State v. Setzer, 268 N.J. Super. 553, 567, 634 A.2d 127 (App. Div. 1993)*, *certif. denied, 135 N.J. 468, 640 A.2d 850 (1994)*.

Finally, mitigating factor eight, that defendant's conduct was the result of circumstances unlikely to recur, *N.J.S.A. 2C:44-1(b)(8)*, was clearly inapplicable because of defendant's extensive history of similar offenses and his inability to control his anger, his drinking, and his hostility to the police.

The trial court having explained its reasons for rejecting the mitigating factors proposed by defendant, and those reasons being fully supported by the competent credible evidence in the record, *see Bieniek, supra, 200 N.J. at 608*, we conclude there was no sentencing error in application of aggravating and mitigating factors under the Criminal Code.

Overall, the trial court did not commit any error or otherwise abuse its discretion in sentencing defendant.

Affirmed.

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[2] The transcript of the sentencing hearing does not include a reference to mitigating factor nine, the character and attitude of the defendant indicate that he is unlikely to commit another offense, *N.J.S.A. 2C:44-1(b)(9)*. With the finding of aggravating factor three, that defendant was likely to commit another offense, mitigating factor nine was clearly inapplicable.

State v. Bomani

Superior Court of New Jersey, Appellate Division

December 2, 2013, Argued; March 3, 2014, Decided

DOCKET NO. A-3373-11T1

Reporter
2014 N.J. Super. Unpub. LEXIS 415 *; 2014 WL 813896

STATE OF NEW JERSEY, Plaintiff-Respondent, v. KAFELE K. BOMANI, a/k/a SHAUN A. GOODING, SHAWN GOODING, SHAUN GRANT, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by *State v. Bomani, 219 N.J. 628, 99 A.3d 833, 2014 N.J. LEXIS 1037 (Sept. 8, 2014)*

US Supreme Court certiorari denied by *Bomani v. New Jersey, 574 U.S. 1140, 135 S. Ct. 1185, 191 L. Ed. 2d 141, 2015 U.S. LEXIS 903 (Jan. 26, 2015)*

Post-conviction relief denied at *State v. Bomani, 2020 N.J. Super. Unpub. LEXIS 291 (N.J. Super. Ct., Feb. 10, 2020)*

Prior History: **[*1]** On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 09-08-2019.

Core Terms

sentence, shooter, clothing, identification, shooting, recording, rooming house, trial court, surveillance, shirt, door, new trial, video, questioned, Hotel, exigent circumstances, police officer, convicted, seized, arrived, factors, minutes, argues, shot, hot pursuit, investigators, approached, wearing, certif, newly

Counsel: Marcia Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Blum, of counsel and on the brief).

James F. Smith, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (James P. McClain, Acting Atlantic County Prosecutor, attorney; Mr. Smith, of counsel and on the brief).

Appellant filed a Pro se supplemental brief.

Judges: Before Judges Ashrafi and St. John.

Opinion

PER CURIAM

Defendant Kafele Bomani appeals from his conviction by a jury for attempted murder and from his sentence of life imprisonment. We affirm the conviction but reverse and remand for resentencing.

I.

The jury found defendant guilty of shooting another man on a street corner in Atlantic City. The victim survived the shooting but refused to cooperate with the police and never identified his assailant. The defense at trial was that the police had incorrectly identified defendant as the shooter seen on a surveillance recording.

On appeal, defendant challenges the admission of highly

incriminating clothing evidence seized without a warrant **[*2]** from his residence, his identification by an eyewitness, the prosecutor's improper questioning of a police witness, the court's denial of a new trial based on newly discovered exculpatory evidence, and the consideration of improper factors in imposing a life sentence. The facts were developed at pretrial hearings and at defendant's six-day trial.

At about 2:18 a.m. on October 20, 2007, Lameck Ganda[1] was working in the security booth of the Wyndham Resort Hotel in Atlantic City. He heard a commotion outside and then saw on the hotel's security camera monitors that four men were arguing and fighting on hotel property. One of the men was wearing a red shirt and another man was wearing a distinctive multi-colored checkered shirt. Lameck went outside and spoke to the men, approaching to within about eight feet of them. He directed the men to leave the hotel property. The four men went in the direction of the nearby Resorts Casino.

Shortly before 6:40 a.m., Lameck again saw four men on the video monitors who appeared to be arguing. **[*3]** He was able to zoom the surveillance cameras in and out. He zoomed in on the men's faces and saw that the disturbance involved the same men that he had approached earlier in the night.

Lameck then saw the man wearing the checkered shirt go to a dark-colored SUV parked nearby in the street and retrieve something from inside the vehicle. That man walked up to the man in the red shirt and fired a shot at him. The man in the red shirt held his stomach and fled in one direction as the gunman ran back to the SUV and drove away.

A few minutes later, a police officer on duty outside the Taj Mahal Casino was approached by the man who had been shot. The officer called for medical assistance at 6:43 a.m. The victim talked to the officer, but he would neither identify himself nor his shooter. Emergency responders arrived and took him to a hospital. He was eventually identified as Cullen Green. Doctors later told the police Green had been shot in the chest and suffered lacerations to his liver and diaphragm. After emergency surgery, Green recovered and was released from the hospital within a few days. When a detective approached him several weeks later, he refused to cooperate and gave no information **[*4]** about the shooting.

Meanwhile, at the scene of the shooting on October 20, the police quickly learned that the Wyndham Hotel security cameras had captured and recorded the crime. At about 7:00 that morning, Lameck replayed the soundless video recordings for the police in the hotel's security office. The police could see the shooting as it occurred at the intersection of North Carolina and Pacific Avenues. The shooter was wearing a distinctive checkered shirt, which the police described as white, green, blue, and yellow. He was also wearing a white T-shirt, jeans, tan boots, and a light-colored cap with an emblem. The police could not get a clear view of the shooter's face. They saw him run away from the intersection to a dark-colored SUV and drive away.

The SUV was mostly obscured on the video by an awning or banner hanging from the hotel in front of the surveillance camera, but a police officer could see the wheels of the vehicle and believed it was either a Ford or a Nissan from his familiarity with those SUVs. The police description of the shooter and the vehicle was broadcast to police officers on patrol.

At the same time, the investigating detectives learned that another Wyndham **[*5]** Hotel employee had witnessed the shooting. John Lopez had arrived early that morning to begin his shift as a bellman and valet parking attendant. At the time of the shooting, he was sitting outside the hotel in his car. He saw three men who were apparently arguing. He then saw the man in the checkered shirt go to a dark-colored SUV and retrieve an item. That man approached the man in the red shirt and shot him. Although Lopez did not see the shooter's face, he described his clothing and general appearance consistently with Lameck and the appearance of the man on the video recording. More significant, Lopez had observed and memorized the license plate number of the SUV and gave that information to the police.

The police quickly matched the plate number to a vehicle registered to defendant Bomani at an address on Memorial Avenue, which is within four blocks of the site of the shooting. Sergeant James Sarkos of the Atlantic City Police was in the area, and he was familiar with the Memorial Avenue address. It was a four-floor rooming house owned by the father of a police officer. Sergeant Sarkos had been inside that building previously and knew it contained three apartments and twenty-one **[*6]** individual rooms. The owner had given the police permission to enter the building, and in fact had requested that the police patrol inside the building because of drug and other criminal activity in the neighborhood and because of trespassing vagrants. A key to the front door of the building was kept at the police department's vice squad, and some individual officers also had the key. The police periodically entered the building to conduct "walk-through" inspections for the safety of the residents and others. Often, the key was not needed because tenants would prop the front door open as they sat outside on the stoop, and the police could readily enter, as well as other

[1] Our record does not indicate clearly the witness's first and last names. The attorneys at trial referred to the witness as Lameck. We will do the same in this opinion.

members of the public. Sergeant Sarkos was also acquainted with the manager of the building and had gained access in the past simply by knocking on the door when it was locked and being granted entry into the common areas by the manager or other tenants.

At approximately 7:07 a.m., Sergeant Sarkos and another police officer, Cecil Randall, arrived at the Memorial Avenue address. As Sergeant Sarkos approached the front door, a woman was leaving. Sergeant Sarkos held the door as the woman left, and he and Officer Randall **[*7]** entered the hallway. Almost immediately, Sergeant Sarkos saw a man wearing jeans and sandals but no shirt and carrying a bottle of liquor. He questioned the man, who identified himself as defendant Bomani. Defendant said he lived in room 11 on the second floor and that a woman was present in the room at that time. He said he had been at a bar earlier that night. Sergeant Sarkos detained defendant and directed Officer Randall to secure room 11.

As Officer Randall went to the second floor, he saw a woman wrapped in a towel near the common bathroom in the hallway. He asked her whether she knew where room 11 was, and she said no. The officer found the room and saw that the door had been propped wide open by placing carpet underneath it. The officer looked into the room and immediately saw on the floor a checkered shirt, a light-colored cap, and tan boots as had been described in the police dispatch. He entered the room to determine whether anyone was present there. No one was in the room.

At that time, the woman in the towel entered the room, and Officer Randall questioned her. She said she had arrived between 6:30 and 7:00 a.m., that defendant was present when she arrived, and that defendant **[*8]** had gone downstairs to get a bottle of liquor while she went to the bathroom. The officer instructed the woman to get dressed, and she was taken to police headquarters to be questioned further. Although the identity of the woman was known, neither the State nor defendant called her as a witness at the trial.

Still in the first-floor hallway, defendant told Sergeant Sarkos that his vehicle was parked at a nearby garage on New York Avenue. At 7:17 a.m., an officer found a black Ford SUV in the garage with the license plate number provided by the eyewitness. The officer touched the vehicle's hood and found it to be warm, indicating it had been driven recently. Sergeant Sarkos was notified. Defendant then voluntarily gave him the vehicle's key, and a police officer drove the SUV out of the garage and parked it on the street near the rooming house.

At a later time and at the trial, the manager of the garage provided relevant information. He said that the garage did not have surveillance video available, but its business records generated by the entry ticket machine showed that two vehicles had entered before 7:15 that morning, at 6:44 and 6:55. The prosecution argued before the jury that **[*9]** defendant's vehicle must have been the second of these entries, and the defense argued that defendant would not have had enough time to park his vehicle, dispose of evidence, get to his room, undress, and be present shirtless in the hallway of his rooming house in time for Sergeant Sarkos to find him just after 7:07 a.m.

At 8:15 a.m. in the rooming house, a detective formally warned defendant of his *Miranda*[2] rights. Defendant answered a few questions, stating that he lived alone in room 11 and no one else had a key to his room. At 8:30 and 8:45 a.m., defendant signed consent forms permitting the police to search, respectively, his vehicle and his room. From the apartment, the police seized the clothing and some other items not relevant to this appeal. They did not find a gun there. They also did not find a gun or any other evidence in the vehicle.

The police then transported Lameck and Lopez together to the area of the rooming house to see if they could identify defendant and the vehicle. From inside the police car, they both looked at the vehicle and at defendant, who was in police custody and still shirtless. **[*10]** Lopez did not identify defendant, testifying before the jury that he never saw the shooter's face, but he said that defendant's appearance was similar to the man he had seen. Lopez confirmed the license plate number of the black Ford SUV as the vehicle he had observed immediately before and after the shooting. Lameck identified defendant but not the vehicle.

Defendant was indicted on six counts: first-degree attempted murder, *N.J.S.A. 2C:5-1* and *2C:11-3(a)(1)*, *(2)*; second-degree aggravated assault causing serious bodily injury, *N.J.S.A. 2C:12-1(b)(1)*; third-degree aggravated assault with a deadly weapon causing bodily injury, *N.J.S.A. 2C:12-1(b)(2)*; third-degree possession of a weapon for an unlawful purpose, *N.J.S.A. 2C:39-4(a)*; third-degree unlawful possession of a handgun without a permit, *N.J.S.A. 2C:39-5(b)*; and second-degree possession of a handgun by a convicted person, *N.J.S.A. 2C:39-7*.

At a pretrial suppression hearing to determine the admissibility of the clothing taken from defendant's room, Sergeant Sarkos was the only witness, and he testified as summarized here to the circumstances of the police entry into the Memorial Avenue rooming house and room 11. The court

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[2] *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

denied defendant's **[*11]** motion to suppress, concluding that the warrantless entry of the building and the room was justified by exigent circumstances.

At a pretrial *Wade*[3] identification hearing before a different judge, the State represented that Lopez would not make a positive identification of defendant at trial but would only describe the person he saw. The judge heard testimony from Lameck and concluded that his identification of defendant would be admissible at the trial.

At the trial, the prosecution presented the two eyewitnesses and the garage manager, the doctor who had performed emergency surgery on Green, numerous police officers and detectives who had participated in the investigation, and expert testimony establishing that DNA of two persons was found in the checkered shirt and cap taken from defendant's room and that one of the profiles was consistent with defendant's DNA.

The video surveillance recording was admitted in evidence but not in an original form. The detectives had never been able to make a copy of the digital surveillance recording from the Wyndham Hotel security system. Instead, they had used their own **[*12]** video recorder to film what they were looking at on the monitor in the Wyndham security office. The trial court conducted a pretrial hearing and ruled that the copied surveillance evidence would be admissible at trial. A slow motion version of that five-minute recording was played for the jury, showing the moment of the shooting and the shooter's flight on foot to the SUV. We have viewed the video recording as part of the appellate record. Because of the angle of the surveillance view and the quality of the recording, the face of the shooter is not clear, although his general appearance, clothing, and actions are readily visible.

Defendant did not testify at his trial. Green was subpoenaed and testified in the defense case. He said that defendant was not the person who shot him, and he did not know who the shooter was. Green further testified that at the time of trial he was serving an eighteen-year sentence on a narcotics conviction. He testified on direct examination that a prosecutor's detective had approached him in prison and offered him leniency on his own charges if he would identify defendant as the shooter. The prosecution presented rebuttal testimony from two police detectives **[*13]** to contradict Green's claim that he had been offered leniency in exchange for identifying defendant.

The jury convicted defendant of all six counts of the indictment.[4]

Several weeks after the verdict, defendant moved for a new trial on the ground that newly discovered evidence would demonstrate he was wrongly identified. He presented a handwritten certification from an inmate named Matthew Hayes who was housed at the county jail at the same time as defendant during the trial. Hayes said he was a friend of Green and also familiar with defendant. He claimed he was with Green at the time of the shooting, that several individuals had fought with him and Green, and defendant was not one of them and did not shoot Green. The court conducted a post-trial hearing, took testimony from Hayes, and concluded that his testimony was not credible. The court denied defendant's motion for a new trial.

The court then granted the State's motion for an extended term Graves Act sentence because defendant had a prior conviction for an aggravated **[*14]** assault involving the use of a firearm. *See* N.J.S.A. 2C:43-6(c). The court merged counts two through five of the indictment with count one and sentenced defendant on the attempted murder charge to a life term subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court also imposed a concurrent term of ten years imprisonment on the sixth count.

On appeal before us, defendant makes the following arguments through his attorney's brief:

> *POINT I*
> THE CLOTHING AND STATEMENTS OBTAINED FROM DEFENDANT MUST BE SUPPRESSED BECAUSE THEY ARE THE RESULT OF THE WARRANTLESS ENTRY OF HIS HOME.
>
> *POINT II*
> WHERE THE VICTIM TESTIFIED THAT HE DECLINED THE PROSECUTOR'S OFFER TO TESTIFY AGAINST DEFENDANT IN EXCHANGE FOR LENIENCY ON HIS CHARGES, IT WAS FLAGRANT MISCONDUCT FOR THE PROSECUTOR TO TELL THE JURY THAT HE WOULD NEVER HAVE MADE SUCH AN OFFER BECAUSE IT WOULD CONSTITUTE AN ILLEGAL BRIBE. (Not Raised Below).

[3] *United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)*.

[4] The sixth count, charging possession of a firearm by a convicted person, was bifurcated and tried separately before the same jury after the verdict on the other five counts.

POINT III

THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL BASED ON THE NEWLY DISCOVERED EYEWITNESS EVIDENCE EXONERATING DEFENDANT.

POINT IV

A LIFE TERM IS GROSSLY EXCESSIVE FOR THIS DEFENDANT AND THIS OFFENSE.

In a **[*15]** supplemental pro se brief, defendant raises the following additional arguments:

POINT I

THE IDENTFICATION "SHOW UP" EVIDENCE SHOULD HAVE BEEN SUPPRESSED BECAUSE THE PROCEDURE WAS IMPERMISSIBL[Y] SUGGESTIVE AND UNRELIABLE AND ITS ADMISSION VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE *FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION* AND *ART. I PAR I OF THE NEW JERSEY CONSTITUTION.*

POINT II

THE TRIAL COURT DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE *FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION* AND *ART. I, PARA. I OF THE NEW JERSEY CONSTITUTION* BY FAILING TO INSTRUCT THE JURY ON THE LAW OF THE MATERIAL FACTS OF THE CASE.

A. THE TRIAL COURT ERRED BY GIVING AN UNBALANCED FOCUS ON THE ASPECT OF THE IDENTIFICATION THAT WERE FAVORABLE TO THE STATE. BY ATTEMPTING TO "MOLD" THE JURY INSTRUCTION TO THE FACTS OF THE CASE.

B. THE TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON THE USE OF THE "VIDEOTAPE" ACCORDING TO THE LAW.

C. TRIAL COURT ERRED BY NOT INSTRUCTING THE JURY ON CONTRADICTION AND INCONSISTENT STATEMENT.

POINT III

THE DEFENDANT *FOURTEENTH AMENDMENT* RIGHTS WERE VIOLATED BY THE ATLANTIC CITY POLICE DEPARTMENT AND THE ATLANTIC COUNTY **[*16]** PROSECUTORS OFFICE BY ACTING IN "BAD FAITH" BY NOT PRESERVING THE SURVEILLANCE TAPE EVIDENCE.

POINT IV

THE TRIAL COURT FAILED TO INSTRUCT ON AGGRAVATED ASSAULT AS A LESSER OFFENSE OF ATTEMPTED MURDER UNDER COUNT I OF INDICTMENT. (Not Raised Below).

We have considered all of defendant's arguments. As to those pro se arguments that we do not address further, we have concluded they lack sufficient merit for discussion in a written opinion. *R. 2:11-3(e)(2)*.

II.

Defendant contends the police violated his federal and State constitutional rights by entering the Memorial Avenue rooming house without a warrant and seizing the highly incriminating clothing from his room.

In reviewing a motion to suppress evidence, we must defer to the trial court's fact findings and "feel" of the case and may not substitute our own conclusions regarding the evidence, even in a "close" case. *State v. Locurto, 157 N.J. 463, 471, 724 A.2d 234 (1999)* (quoting *State v. Johnson, 42 N.J. 146, 161-62, 199 A.2d 809 (1964)*; *accord State v. Robinson, 200 N.J. 1, 15, 974 A.2d 1057 (2009)*; *State v. Elders, 192 N.J. 224, 243-44, 927 A.2d 1250 (2007)*. However, "[i]f the trial court acts under a misconception of the applicable law," we need not defer to its ruling. *State v. Brown, 118 N.J. 595, 604, 573 A.2d 886 (1990)*.

"[T]he **[*17]** *Fourth Amendment* has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639, 653 (1980)*; *accord State v. Penalber, 386 N.J. Super. 1, 11, 898 A.2d 538 (App. Div. 2006)*. In *Welsh v. Wisconsin, 466 U.S. 740, 750, 104 S. Ct. 2091, 2098, 80 L. Ed. 2d 732, 743 (1984)*, the Supreme Court stated: "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."

The State argues that an exception existed to the warrant requirement because the police in this case were in "hot pursuit" of a dangerous suspect. Defendant disputes the "hot pursuit" exception, arguing that the police had not pursued the shooter from the scene of the crime. He argues there was no exigency and the police had time and opportunity to present their evidence to a judge for a determination of whether there was probable cause for a warrant to enter the building and subsequently seize evidence from defendant's **[*18]** room.

Courts have found exigent circumstances justifying warrantless entry when the police are in pursuit of a dangerous suspect because delay to obtain a warrant endangers the lives of officers and bystanders. *Warden, Md. Pen. v. Hayden, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967)*; *State v. Hutchins, 116 N.J. 457, 464, 561 A.2d 1142 (1989)*. "Hot pursuit," as the term connotes, requires a close temporal link between a serious criminal event and the police chase that results in a warrantless entry. *See Welsh, supra, 466 U.S. at 753, 104 S. Ct. at 2099, 80 L. Ed. 2d at 745*. The nature of the offense that the police were investigating is very important in justifying warrantless entry of a home in "hot pursuit." *See id. at 749-50, 104 S. Ct. at 2097-98, 80 L. Ed. 2d at 743* (no exigent circumstances existed for hot pursuit after a traffic offense); *State v. Bolte, 115 N.J. 579, 596-97, 560 A.2d 644* (adopting *Welsh*'s rationale in case involving driving while intoxicated), *cert. denied, 493 U.S. 936, 110 S. Ct. 330, 107 L. Ed. 2d 320 (1989)*.

For instance, in *Hayden, supra, 387 U.S. at 297-98, 87 S. Ct. at 1645, 18 L. Ed. 2d 786-87*, police received information from witnesses that a suspect in an armed robbery **[*19]** had fled to a specific address. Within minutes, the police arrived and searched the residence, finding the defendant and his weapons. *Ibid.* In upholding the warrantless search and seizure, the Supreme Court emphasized the short time between the suspect's flight into the residence and the officers' arrival. *Id. at 298, 87 S. Ct. at 1646, 18 L. Ed. 2d at 787*. Likewise, in *State v. Davis, 204 N.J. Super. 181, 184, 497 A.2d 1284 (App. Div. 1985), certif. denied, 104 N.J. 378, 517 A.2d 388 (1986)*, the "hot pursuit" exception applied where the victim told officers the suspect in an armed robbery was at a specific address and the officers "within minutes took up the pursuit."

Defendant relies heavily on our decision in *State v. Jefferson, 413 N.J. Super. 344, 356-57, 994 A.2d 1067 (App. Div. 2010)*, and argues that we rejected the "hot pursuit" and exigency exceptions in factual circumstances similar to this case. However, Sergeant Sarkos's initial entry into the rooming house is not controlled by our holding in *Jefferson*. There, the police were investigating a citizen's tip of shots fired, and they located the suspected car of the alleged shooter in front of the defendant's residence, which was a multi-family house. *Id. at 349-50*. The **[*20]** police forcibly entered the otherwise locked front door as the defendant tried to keep them out. *Id. at 350-51*. A significant distinguishing factor of *Jefferson* and this case is that the common area of the multi-family house in *Jefferson* was not open to the police or the public. "The door was kept locked, and only the tenants and landlord had access to the common hallway." *Id. at 350*. Here, the police had ready access to the common areas of the Memorial Avenue rooming house and had, in fact, the owner's standing permission to enter for the purpose of conducting police work. The owner had given the front-door key to the police, and they were also routinely admitted by the manager or other tenants. Furthermore, the door was often left open so that members of the public could enter at will. In contrast to the facts of *Jefferson*, defendant Bomani had no reasonable expectation of privacy in the common hallway of the Memorial Avenue rooming house. He had no constitutional right to exclude the police from the building as a whole.

The more significant search and seizure issue is whether the police needed a warrant to enter room 11 and to seize the clothing. Since the public and the police did **[*21]** not have permission to enter defendant's room, the State needed to show an exception to the warrant requirement for Officer Randall's entry into the room and observation of the clothing on the floor. The trial court ruled correctly that exigent circumstances permitted a limited entry of the room for purposes of securing it against danger to the police and the public. Since the clothing was seen in plain view both before and after the officer entered the room, there was no further infringement upon defendant's constitutional rights in the police seizure of the clothing. Furthermore, the police obtained defendant's consent to enter and search the room before they actually seized the clothing.

The police arrived at defendant's residence less than thirty minutes after a shooting. They entered the common area of the building, as they were permitted to do by the landlord. The police immediately found and detained defendant, but they did not find a gun and could not know at that time whether anyone else was present in his room that had access to a handgun. They acted reasonably within the meaning of the *Fourth Amendment* in continuing their investigation to defendant's second-floor room to **[*22]** determine whether any danger still existed. There, Officer Randall found the door of room 11 wide open, and he immediately observed in plain view highly incriminating evidence that tied defendant directly to the recent shooting. The distinctive clothing described in the police broadcasts sat on the floor of the room in plain view. At that point, police suspicion that defendant was the shooter had clearly developed into probable cause for

his arrest.

There was no violation of defendant's federal or State constitutional rights in Officer Randall's looking into room 11 because the officer had a right to be present at the threshold of the room and the door was open. The facts here are not like *State v. Lewis, 116 N.J. 477, 485-86, 561 A.2d 1153 (1989)*, where the police had no right to be present at the location from which they observed contraband drugs in the defendant's room. In this case, the officer's observation of incriminating evidence was justified by the plain view exception to the warrant requirement. *See State v. Johnson, 171 N.J. 192, 206-07, 793 A.2d 619 (2002)* (citing *Coolidge v. New Hampshire, 403 U.S. 443, 465-68, 91 S. Ct. 2022, 2037-39, 29 L. Ed. 2d 564, 582-84 (1971)*; *State v. Bruzzese, 94 N.J. 210, 236, 463 A.2d 320 (1983)*, **[*23]** *cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)*.

After observing the clothing in the room, Officer Randall acted reasonably in entering without a warrant to conduct a limited sweep for the presence of other persons or weapons. *See Maryland v. Buie, 494 U.S. 325, 327, 334-36, 110 S. Ct. 1093, 1094, 1098-99, 108 L. Ed. 2d 276, 281, 286-87 (1990)*; *see also State v. Wright, 213 N.J. Super. 291, 294, 296, 517 A.2d 171 (App. Div. 1986)* (public safety exigency justified warrantless search of motel premises to find gun used in immediately-reported crime), *certif. denied, 118 N.J. 235, 570 A.2d 985 (1989)*; *cf. New York v. Quarles, 467 U.S. 649, 651-52, 655-56, 104 S. Ct. 2626, 2629, 2631, 81 L. Ed. 2d 550, 554, 557 (1984)* (defendant's statement about where he discarded a gun in a supermarket was admissible under public safety exception to requirement that police give *Miranda* warnings to suspect in custody).

In *State v. Laboo, 396 N.J. Super. 97, 99-101, 108, 933 A.2d 4 (App. Div. 2007)*, we concluded that police officers were justified in breaking down an apartment door and entering without a warrant in the continuing investigation of several armed robberies that had occurred thirty hours earlier. The exigent circumstances **[*24]** were created by the seriousness of the offense, the quickly developing probable cause, and the police objective of ensuring the public's safety. *Id. at 103-05*. Here, the officer's entry was much less intrusive than in *Laboo*, and the shooting had occurred only thirty minutes earlier.

Determining whether exigent circumstances permitted the police to dispense with a warrant "demands a fact-sensitive, objective analysis" under the totality of the circumstances. *State v. Nishina, 175 N.J. 502, 516-17, 816 A.2d 153 (2003)* (quoting *State v. Deluca, 168 N.J. 626, 632, 775 A.2d 1284 (2001)*). The exception for exigent circumstances does not have "neatly defined contours." *State v. Cassidy, 179 N.J. 150, 160, 843 A.2d 1132 (2004)*; *see State v. Cooke, 163 N.J. 657, 676, 751 A.2d 92 (2000)* ("the term 'exigent circumstances' is, by design, inexact"). An exigency usually requires a showing of spontaneous and unforeseeable circumstances. *Nishina, supra, 175 N.J. at 516-17*; *Cooke, supra, 163 N.J. at 668*. An important consideration is whether the exigency arose in a fluid, ongoing investigation that precluded an earlier attempt to obtain a warrant. *See Hutchins, supra, 116 N.J. at 470-71*.

Here, it clearly did. The information that the police learned in the **[*25]** minutes preceding their entry into defendant's room reliably identified defendant as the prime suspect in an attempted murder on the street by gunfire. No gun had been found, although the shooting had occurred only minutes earlier. There was potential danger to the safety of the residents of the rooming house and the police if the room was not secured by a limited entry to make certain no one else was present who had access to a gun. *See Buie, supra, 494 U.S. at 335-36, 110 S. Ct. at 1099, 108 L. Ed. 2d at 287*; *State v. Henry, 133 N.J. 104, 118, 627 A.2d 125*, *cert. denied, 510 U.S. 984, 114 S. Ct. 486, 126 L. Ed. 2d 436 (1993)*.

Finally, defendant's focus at the suppression hearing, and on appeal, has been the police entry of the rooming house building rather than defendant's room. We have rejected any constitutional impropriety in that initial entry. Furthermore, the actual seizure of the clothing occurred after defendant consented to the search of his room. Nevertheless, we conclude that even before the police obtained defendant's consent, they could seize the clothing without violating defendant's constitutional rights. Once the highly incriminating nature of the clothing was determined from outside **[*26]** the room, where the police were permitted to be, they could enter for the purpose of seizing the evidence provided that they conducted no further search for other evidence. *State v. O'Donnell, 408 N.J. Super. 177, 185-87, 974 A.2d 420 (App. Div. 2009)*, *aff'd o.b., 203 N.J. 160, 1 A.3d 604*, *cert. denied, __ U.S. __, 131 S. Ct. 803, 178 L. Ed. 2d 537 (2010)*.

Having considered all the potential search and seizure issues, we find no legal or factual error in the trial court's admission of the clothing seized from defendant's room.

III.

In his pro se brief, defendant argues that Lameck's identifications of him should not have been admitted before the jury because they were the product of a suggestive "show-up" procedure on the date of his arrest. The trial court agreed that the show-up procedure was inherently suggestive, and it conducted an evidentiary pretrial hearing to evaluate the reliability of the identification. After hearing testimony

directly from Lameck, the court determined that his identification of defendant was reliable and thus admissible. *See* State v. Madison, 109 N.J. 223, 232, 536 A.2d 254 (1988) (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)). We find no reason **[*27]** to disturb that ruling.

The identification of defendant occurred before our State Supreme Court's decision in State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011), which does not apply retroactively, id. at 220, 302. At the time of defendant's trial, courts determined whether an identification was admissible based on five factors: (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness's degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confronta-tion"; and (5) "the time between the crime and the confronta-tion." Id. at 237-41 (quoting Madison, supra, 109 N.J. at 239-40). Based on those factors, a reliable identification was admissible while an unreliable identification was not. *Ibid.* On appeal, the trial court's reliability findings are "entitled to considerable weight." State v. Wilson, 362 N.J. Super. 319, 327, 827 A.2d 1143 (App. Div.), *certif. denied, 178 N.J. 250, 837 A.2d 1093 (2003).*

Lameck testified that he came within eight feet or less of defendant earlier in the night and spoke to defendant and the other three men for several minutes. He saw defendant's face. Lameck testified further **[*28]** that, when the men came back four hours later, he zoomed in on their faces with the surveillance camera, thus indicating his attention to their identity. The show-up identification occurred within a few hours of Lameck's observation of the crime. Finally, there was no evidence that the officer who transported Lameck to the scene made suggestive comments prompting the identification, or that Lopez and Lameck exchanged information, especially since Lopez could not positively identify defendant as the shooter.[5]

Furthermore, we reject defendant's contention that the show-up identification was unreliable because Lameck was focused only on defendant's clothing. Lameck testified that he observed the man's face. Moreover, at the time of the show-up, defendant was not wearing the same distinctive shirt and cap seen on surveillance **[*29]** recordings.

The clothing, however, is very important in the case because, when the record of the trial is viewed in its entirety, Lameck's identification testimony played a much lesser role in the prosecution's case than did the surveillance recording in conjunction with the other evidence tying defendant to the crime. Lameck had some language difficulties in communicating his observations as a trial witness, and his identification testimony was not the prosecution's central point of emphasis.

Nor was the lack of clarity in the video recording a substantial obstacle to identifying defendant. The prosecution had produced still photographs from the recording for the jury to compare to the other evidence tying defendant to the crime. The crucial evidence was the unexplainable circumstances of defendant's vehicle being used by the shooter, his possession of the key to his vehicle when Sergeant Sarkos confronted him, the presence of the distinctive clothing in defendant's room, defendant's admission that others did not have access to his room, and the jury's ability to see for itself that defendant's general appearance was not noticeably distinct from the general appearance of the shooter **[*30]** seen on the video and in the still photographs.

In that regard, the defense produced testimony of the victim Green that may have hurt the defense more than it helped.[6] Green swore under oath that the unknown assailant who shot him was taller than Green. Yet, the jury could see for itself that the shooter was shorter than Green, and it could compare the general appearance of the person seen on the video and in the photographs with defendant as he appeared in the courtroom.

In sum, the jury could determine from all the evidence whether Lameck's identifications were reliable. The trial court did not err in its application of the existing law at the time of the trial and in permitting the jury to hear that testimony.

IV.

Defendant argues that prosecutorial misconduct tainted his trial. During the defense case, Green testified that a prosecutor's detective visited him while in prison and offered him a reduction of his own sentence for narcotics crimes if he testified that defendant shot him. In rebuttal, the prosecutor **[*31]** presented the testimony of the two detectives that had spoken to Green. One testified that he merely served a trial subpoena on Green on May 3, 2011, shortly before the trial. The second, Sergeant Davis of the prosecutor's office, had earlier testified in the prosecution's case in chief that he had

[5] *See also* State v. Wilkerson, 60 N.J. 452, 461, 291 A.2d 8 (1972) ("On or near-the-scene identifications have generally been supported upon three grounds. They are likely to be accurate, taking place, as they do, before memory has faded. They facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent.")

[6] Defense counsel had advised defendant against calling Green as a defense witness but deferred to defendant's instruction that Green and his testimony be presented to the jury.

visited Green on November 12, 2007, and that Green had refused to cooperate in the investigation.

Defendant urges prejudicial error in the following testimony by Sergeant Davis in response to the prosecutor's questioning when he was recalled to the stand during the State's rebuttal case:

> Q: Ever tell Mr. Green that if he identified Kafele Bomani as the shooter you would help him out on his drug case?
> A: No, I did not.
> Q: Would that be breaking the law?
> A: Yes, it would be.
> [Judge sustains defense objection that the question was leading.]
> Q: Is bribing someone breaking the law as far as you know?
> A: Yes, it is.

There was no further defense objection to the last two questions and answers. On cross-examination, the witness explained that plea bargaining was conducted by the prosecutor's office and that he did not get personally involved in offering leniency to potential witnesses.

Defendant argues the **[*32]** prosecutor engaged in flagrant misconduct requiring reversal of his conviction because plea bargains in exchange for testimony are not against the law, but the prosecutor suggested otherwise to the jury. The plain error standard of review applies to this contention because defense counsel at trial did not object for the reason that defendant now argues. A conviction will be reversed for plain error only if it was "clearly capable of producing an unjust result," *R. 2:10-2*, that is, if it was "'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached[.]'" *State v. Taffaro, 195 N.J. 442, 454, 950 A.2d 860 (2008)* (quoting *State v. Macon, 57 N.J. 325, 336, 273 A.2d 1 (1971)*).

While we agree with defendant that the last two quoted questions of the prosecutor were misleading and objectionable, no reversible error occurred. Green's testimony in the defense case suggested that police investigators wanted defendant identified as the shooter even if that evidence was untrue. The prosecutor could properly question the investigators who had contacted Green and ask them whether they ever asked Green to provide false information about the identity of the shooter. **[*33]** *See State v. Engel, 249 N.J. Super. 336, 378-80, 592 A.2d 572 (App. Div.), certif. denied, 130 N.J. 393, 614 A.2d 616 (1991)*. Such conduct by the investigators, if it had occurred, would be illegal.

The prosecutor's questioning, however, did not directly address the relevant point. Instead, the prosecutor misleadingly suggested to the jury that any offer of leniency to a witness facing his own charges would constitute a bribe and, therefore, be unlawful. That obviously is not so, since plea bargaining in exchange for cooperation and testimony is neither unlawful nor unusual. *See, e.g., State v. Dent, 51 N.J. 428, 438, 241 A.2d 833 (1968)*. Had defense counsel made a timely objection to the misleading nature of the questions, the trial judge could have promptly corrected any misconception of the jury about the availability of plea bargaining to obtain evidence in a criminal case. Absence of contemporaneous objection may lead to a fair inference that "in the context of the trial the error was actually of no moment." *State v. Nelson, 173 N.J. 417, 471, 803 A.2d 1 (2002)* (quoting *Macon, supra, 57 N.J. at 333*).

The prosecutor distorted the subject, but the matter was peripheral to the issues before the jury. The important fact is that Green never **[*34]** identified defendant as the shooter. No prejudicial evidence against defendant resulted from the investigators alleged offer of leniency to Green. The impropriety of the brief testimony did not result in a "possibility [that is] real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *Macon, supra, 57 N.J. at 336*.

V.

Next, defendant argues that he was entitled to a new trial because of newly discovered exculpatory evidence he obtained from fellow inmate Hayes. The court held a post-trial evidentiary hearing at which Hayes testified. By oral decision on the date of defendant's sentencing, the court rejected Hayes's testimony as lacking any credibility, and it denied defendant's motion for a new trial.

A defendant is entitled to a new trial on the ground of newly discovered evidence when that evidence is:

> (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted.
>
> [*State v. Carter, 85 N.J. 300, 314, 426 A.2d 501 (1981)*].

All **[*35]** three prongs of the test must be satisfied before a defendant will be granted a new trial. *Ibid.; State v. Artis, 36 N.J. 538, 541, 178 A.2d 198 (1962)*.

In *State v. Ways, 180 N.J. 171, 187, 850 A.2d 440 (2004)*, the Court confirmed the three-part test for granting a new trial, but it also commented that:

> A jury verdict rendered after a fair trial should not be disturbed except for the clearest of reasons. Newly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial.
>
> [*Id. at 187-88* (citing *State v. Buonadonna, 122 N.J. 22, 51, 583 A.2d 747 (1991)*).]

Here, the trial court accepted that defendant's evidence satisfied the first two factors of the test, but it concluded that Hayes's testimony would probably not have changed the verdict because it was not at all credible. The court commented that Hayes's testimony was inconsistent with his signed certification. For instance, in his certification, Hayes did not say he saw the shooting, but in court he said he did. Hayes also said in his earlier statement that several individuals were fighting **[*36]** with him and Green on the date of the shooting, but in court he said there was only one person. The court also found Hayes lacked credibility because of his prior record of criminal convictions and because of his prior relationship with defendant and his relatives. Hayes was a friend of defendant's nephews and nieces. Most important, the court questioned Hayes's motivation for coming forward after the trial rather than before or during the trial. The court discredited Hayes's explanation that his inclination not to get involved was set aside because he learned only recently that defendant faced a potential life sentence for the crime. Just as the jury rejected Green's exoneration of defendant, the jury was likely to weigh Hayes's version against the other evidence tying defendant to the crime and find it to have been fabricated as well.

In short, the trial court "engage[d] in a thorough, fact-sensitive analysis to determine whether the newly discovered evidence would probably make a difference to the jury." *Ways, supra, 180 N.J. at 191*. It concluded that it would not, and we find no basis on this record to disagree with that conclusion.

VI.

At sentencing, the court determined that defendant **[*37]** was subject to a mandatory extended term sentence pursuant to *N.J.S.A. 2C:43-6(c)* and *44-3(d)* ("the Graves Act") based on defendant's prior conviction from 1991 for aggravated assault with a firearm. As a young adult, defendant was convicted of pointing a loaded handgun at a police officer who was pursuing him. Because of the prior firearms offense, the mandatory sentencing range on the attempted murder charge was from twenty years to life in prison. *N.J.S.A. 2C:43-7(a)(2)*.

The court reviewed defendant's adult criminal record and noted also that he had an extensive juvenile offense history. As an adult, defendant was convicted in 1989 of burglary, in 1991 of possession of a sawed-off shotgun, also in 1991 of the predicate Graves Act assault we described and other related weapons offenses, and separately in 1991 of distributing cocaine. His record showed that he had violated a probationary sentence and also the conditions of parole and that he was required in each instance to serve additional time in custody. In 1999, defendant was again convicted of a narcotics offense and sentenced to prison. He completed the last of his prison sentences in 2000, seven years before he committed the **[*38]** crimes in this case.

The court noted that defendant's prior arrests and sentences had not deterred him from possessing firearms in violation of the law, and, in fact, his conduct had escalated in 2007 in that he used a firearm against the person of another. Defendant's record and the circumstances of the offense in this case led to the court's finding of aggravating factors three, six, and nine, *N.J.S.A. 2C:44-1(a)*, and no mitigating factors, *N.J.S.A. 2C:44-1(b)*. We have no disagreement with those findings. *See State v. Bieniek, 200 N.J. 601, 608-09, 985 A.2d 1251 (2010)*.

In balancing the factors, the court concluded that a life sentence subject to the eighty-five percent parole ineligibility mandate of NERA, *N.J.S.A. 2C:43-7.2*, was justified in this case.

On appeal, a sentence will be affirmed unless the sentencing court abused its discretion (1) by failing to base findings of fact on competent, reasonable credible evidence; (2) by failing to apply correct legal principles; or (3) "when the application of the facts to the law is such a clear error of judgment that it shocks the judicial conscience." *State v. Roth, 95 N.J. 334, 362-66, 471 A.2d 370 (1984)*. Here, we conclude that the court made findings regarding **[*39]** the weight and effect of general deterrence as part of aggravating factor nine based on considerations outside the record and based upon misapplication of the court's sentencing authority.

In eloquent language, the sentencing court expressed its dismay that the victim Green had determined not to cooperate with the police and had gone so far as giving obviously false testimony at defendant's trial. The court stated that Hayes's late emergence for a similar purpose was additional evidence that defendant and his witnesses were intent on following "some code other than the New Jersey code of criminal justice." The court attributed to defendant and others in the criminal community a belief that they could escape criminal liability because this other code of behavior would protect them. Citing *State v. Byrd, 198 N.J. 319, 341, 967 A.2d 285*

(2009), the court referred to the problem of witnesses refusing to testify for fear of retaliation by gangs, and it also referred to a newspaper editorial about the silence of crime victims in dangerous urban settings. In the same vein, the court referenced a recent amendment to the New Jersey Rules of Evidence, *N.J.R.E. 804(b)(9)*, creating a hearsay exception where **[*40]** a party has wrongly procured the unavailability of the declarant as a trial witness. In closing on this subject, the court said "I see the aggravating factors — and, again, especially factor nine — as demanding aggressive and forceful response on behalf of the public."

While the court's concerns were legitimate and perhaps justified in this case, defendant was not charged with and was never convicted of suborning perjury from Green and Hayes, and there was no evidence other than the court's perception that he had orchestrated false defense testimony. Although the court understandably sought to address the problem of victim and witness intimidation, and neglect of an orderly system of criminal justice, it had no authority to sentence defendant for engaging in unproven conduct. Its sentencing authority was limited to the crimes for which defendant had actually been convicted, an attempted murder and the possession of a firearm by a convicted person. To accomplish the general deterrent effect that motivated the court, the State would have to charge and convict this defendant or others for engaging in criminal activity related to the separate code of justice to which the court referred.

Unless **[*41]** otherwise authorized by statute, a criminal sentence may not be based on "consideration[s] wholly unrelated to [the] underlying crime." *State v. Ikerd, 369 N.J. Super. 610, 621, 850 A.2d 516 (App. Div. 2004)*; *see also State v. Sainz, 107 N.J. 283, 293, 526 A.2d 1015 (1987)* (the court is not permitted to sentence for a crime to which defendant did not plead guilty). Although a general deterrence rationale is appropriate, including for crimes related to the offense of conviction, *see State v. Ivan, 33 N.J. 197, 202-03, 162 A.2d 851 (1960)*, the court may not increase a defendant's sentence for crimes or wrongs that have not been proven and that are not part of the charges on which defendant stands convicted.

We reverse the life sentence imposed on defendant for attempted murder and remand for resentencing on that and the merged charges. We do not retain jurisdiction.

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State v. Allen

Superior Court of New Jersey, Appellate Division

March 15, 2016, Argued; March 30, 2016, Decided

DOCKET NO. A-5289-13T2

Reporter
2016 N.J. Super. Unpub. LEXIS 689 *

STATE OF NEW JERSEY, Plaintiff-Respondent, v. ROBERT L. ALLEN, a/k/a ALLEN ALLEN, JASON GREEN, ROBERT GREEN, Defendant-Appellant.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-01-0002.

Core Terms

mitigating factors, robbery, sentencing, theft, teller

Counsel: Peter Blum, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. Blum, of counsel and on the brief).

Jason Magid, Assistant Prosecutor, argued the cause for respondent (Mary Eva Colalillo, Camden County Prosecutor, attorney; Mr. Magid, of counsel and on the brief).

Judges: Before Judges Fisher and Rothstadt.

Opinion

PER CURIAM

At the conclusion of a jury trial, defendant was acquitted of second-degree robbery, *N.J.S.A. 2C:15-1*, but convicted of third-degree theft, *N.J.S.A. 2C:20-3(a)*. Notwithstanding the jury's finding that the State failed to demonstrate defendant's intent to threaten or put the victim in fear of immediate bodily injury — a requisite for the robbery offense charged here but unnecessary on the theft charge[1] — the judge sentenced defendant based on her finding that defendant did threaten or purposely put the victim in fear of immediate bodily injury. Consequently, we remand for resentencing.

During a three-day trial,[2] the jury heard testimony that defendant passed a bank teller a note that read: "Give me the money." The teller responded, "Are you serious?" Defendant stuck out his arm and said, "Come on," and the teller asked what he wanted, to which defendant said, "Twenties." Acting pursuant to bank policy that tellers simply comply with such a demand, the teller provided $2100 from her drawer.

In her closing statement, defense counsel acknowledged a theft occurred but zealously urged the absence of a threat or a purpose to put the victim in fear of injury. As in her opening statement, defense counsel argued in her summation that "to find Robert Allen guilty of robbery, you must find not only that he committed a theft, and that's not an issue here, the defense concedes that he did commit a theft from [the bank,] but you must find that in the course of committing that theft,

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[1] By definition, a person is guilty of robbery "if, in the course of committing a theft, he . . . [t]hreatens another with or purposely puts him in fear of immediate bodily injury." *N.J.S.A. 2C:15-1(a)(2)* **[*2]** .

[2] All evidence was elicited on the first day, closing statements and the jury charge were given on the second, and the jury rendered its verdict on the third.

he either threatened [the bank teller] with bodily harm or put her in fear of immediate bodily injury." After defining the issue in this way, defense **[*3]** counsel argued the words and conduct attributed to defendant failed to satisfy the elements of a robbery. The jury signified its agreement with counsel's argument by acquitting defendant of robbery.

At sentencing, however, the judge declined defendant's invitation to apply mitigating factors one and two because she viewed the evidence differently. With respect to mitigating factor one,[3] the judge said she "considered the crime for which [defendant was] convicted" — which she described as "walk[ing] into a bank and . . . pass[ing] a teller . . . a note saying give me the money" — "caus[es] or certainly does threaten serious harm." Similarly, in rejecting application of mitigating factor two,[4] the judge said the following:

> I find that number two is not applicable. Again, I emphasize it is your purpose, it's not what the other parties believed. I find by a preponderance of the evidence, I find that when you pass a note to someone, your conduct certainly does contemplate harm or a threat of serious harm.

By rejecting these mitigating factors, and by concluding "the aggravating factors[5] clearly, convincingly and substantially outweigh[ed] the mitigating factors," the judge imposed an extended prison term of ten years with a five-year **[*4]** parole disqualifier on the third-degree theft conviction.

In appealing, defendant argues the judge disregarded the jury's verdict in violation of the *Fifth*, *Sixth* and *Fourteenth Amendments*, as well as the same or similar rights guaranteed by our state constitution.[6] We agree.

In imposing the maximum permissible prison term and maximum parole disqualifier, it is clear that the judge assumed defendant was guilty of an offense for which he was acquitted.[7] The limitations on judicial factfinding in sentencing preclude reliance on any fact, other than a prior conviction, that was not submitted to a jury and proved beyond a reasonable doubt. *See, e.g.*, *Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000)*; *State v. Pomianek, 221 N.J. 66, 82-83, 110 A.3d 841 (2015)*.[8] The judge's determination likewise disregarded the special place the law provides **[*5]** for an acquittal. *See, e.g.*, *United States v. DiFrancesco, 449 U.S. 117, 129, 101 S. Ct. 426, 433, 66 L. Ed. 2d 328, 340-41 (1980)*; *State v. J.M., Jr., 438 N.J. Super. 215, 239, 102 A.3d 1233 (App. Div. 2014)*, *certif. granted, 221 N.J. 216, 110 A.3d 929 (2015)*. The sentencing judge was obligated — but failed — to recognize and honor the "collective judgment of twelve of defendant's fellow citizens," *State v. Tindell, 417 N.J. Super. 530, 572, 10 A.3d 1203 (App. Div. 2011)*, when acquitting defendant of second-degree robbery; the judge, instead, proceeded on an assumption that defendant should have been convicted of robbery much as the *Tindell* judge crafted a sentence based on his personal view that the jury let the defendant "get away with murder." *Id. at 569*.

Because the judge nullified the robbery acquittal, defendant must be resentenced by a different judge in conformity with the letter and spirit of this opinion.

Vacated and remanded. We do not retain jurisdiction.

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[3] *N.J.S.A. 2C:44-1(b)(1)* (permitting consideration that "defendant's conduct neither caused nor threatened serious harm").

[4] *N.J.S.A. 2C:44-1(b)(2)* (permitting consideration of whether defendant "contemplate[d] that his conduct would cause or threaten serious harm").

[5] Because of defendant's significant criminal record, the judge applied the aggravating factors defined in *N.J.S.A. 2C:44-1(a)(3)*, *(6)*, and *(9)*.

[6] This appeal was originally heard on an excessive sentencing oral argument calendar, but was removed after argument so that briefs on these issues could be submitted and considered.

[7] Because the judge imposed the maximum sentence possible, we reject the State's argument that any error was harmless — a contention of insufficient merit to warrant further discussion. *R. 2:11-3(e)(2)*.

[8] The judge's failure to apply mitigating factors one and two requires our rejection of her determination that the aggravating factors substantially outweighed what she concluded were the nonexistent mitigating factors — the basis for her imposition of a period of parole ineligibility. This determination must be reconsidered upon resentencing, when the two mitigating factors are added to the calculus and assigned proper weight. We emphasize what should be obvious from the above — that when a proper inclusion of all aggravating and mitigating **[*6]** factors is reconsidered in determining whether to impose a parole ineligibility period — the sentencing judge's view of evidence obviously rejected by the jury will play no role. *See Alleyne v. United States, U.S. , , 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314, 321 (2013)*; *State v. Grate, 220 N.J. 317, 334-35, 106 A.3d 466 (2015)*.

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. Mark Melvin (A-44-19) (083298)
State v. Michelle Paden-Battle (A-13-20) (084603)

Argued February 1, 2021 -- Decided September 23, 2021

PIERRE-LOUIS, J., writing for a unanimous Court.

One of the most important tenets of the criminal justice system is the finality of a jury's verdict of acquittal. These consolidated appeals test that principle through a common legal issue: whether a trial judge can consider at sentencing a defendant's alleged conduct for crimes for which a jury returned a not guilty verdict.

In State v. Melvin, Melvin was indicted on nine counts in connection with a fatal shooting in a restaurant, including charges of murder, aggravated assault, and weapon possession and drug offenses. At the conclusion of the trial, the jury found Melvin guilty of unlawful possession of a handgun but remained deadlocked on the outstanding counts.

With the discretion to sentence Melvin to an extended term of ten to twenty years, the trial court sentenced Melvin to the maximum, citing United States v. Watts, 519 U.S. 148 (1997), in his consideration of Melvin's conduct -- specifically, the evidence relating to the murder charges as to which the jury was hung. The sentencing judge determined that "by a preponderance of the credible evidence at trial, . . . Melvin did in fact use a firearm, which resulted in the death of [the two victims] and the injury to [the restaurant owner]."

The Appellate Division affirmed Melvin's conviction but remanded the matter for resentencing, holding that the sentencing judge incorrectly applied Watts . . . and that a judge cannot act as a "thirteenth juror" by "substitut[ing] his judgment for that of the jury." The court further noted that "[t]he judge abused his discretion by finding [Melvin] was the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision." At the retrial of the deadlocked counts, Melvin was acquitted of murder and aggravated assault, and the State dismissed the drug charges. The same judge who presided over the first trial and sentencing handled Melvin's retrial and resentencing. The judge again cited Watts in his determination that "the evidence at the trial support[ed] a conclusion that [Melvin] was the shooter of the two individuals" at the restaurant, adding, contrary to the jury's verdict, that Melvin "not only . . . possess[ed] said weapon, but he used it to shoot upon three other human beings."

The trial court resentenced Melvin to an extended term, which the Appellate Division affirmed on appeal. The Court granted Melvin's petition for certification, "limited to the issue of whether the sentencing judge could consider defendant's conduct even though the jury acquitted defendant of the underlying crimes." 240 N.J. 549 (2020).

In State v. Paden-Battle, Paden-Battle was indicted in connection with the murder of Regina Baker for offenses including kidnapping, murder, felony murder, gang criminality, and weapons offenses. After a trial -- before the same judge who presided over Melvin's trials and sentencings -- the jury convicted Paden-Battle on the charges of kidnapping, conspiracy to commit kidnapping, and felony murder, and acquitted Paden-Battle of first-degree murder, conspiracy to commit murder, and both weapons offenses.

In sentencing Paden-Battle to sixty years' imprisonment, the judge noted that "Regina Baker would be alive today" if not for Paden-Battle, who, the court added, "was the mastermind" of Baker's kidnapping and execution. The court stated that Paden-Battle "was in charge" because, "[a]lthough she did not pull the trigger," the shooters "did so on her orders."

On appeal, the Appellate Division affirmed Paden-Battle's convictions but vacated her sentence and remanded the matter for resentencing. 464 N.J. Super. 125, 131 (App. Div. 2020). The court concluded that there was "no doubt that the sentence was enhanced because the judge believed defendant ordered Baker's execution," "despite the jury verdict, [and] enhanced the sentence imposed." Id. at 151. The Court granted certification, limited to the sentencing issue. 244 N.J. 233 (2020).

HELD: The Court reverses in Melvin and affirms in Paden-Battle. Article I, Paragraph 1 of the New Jersey Constitution bestows upon all citizens certain natural and unalienable rights. From those rights flows the doctrine of fundamental fairness, which protects against arbitrary and unjust government action. Fundamental fairness prohibits courts from subjecting a defendant to enhanced sentencing for conduct as to which a jury found that defendant not guilty.

1. Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee all criminal defendants the right to a jury trial, and -- under both Constitutions -- due process requires that the prosecution prove each element of a charged crime beyond a reasonable doubt. That burden is underscored through special weight conferred by a jury's acquittal. Not only are defendants protected from being tried a second time for an offense for which they have been acquitted, but, significantly, an acquitted defendant retains the presumption of innocence. (pp. 28-29)

2. In Apprendi v. New Jersey, which the parties here addressed, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Here, because neither defendant was sentenced above the statutory maximum for their counts of conviction, Apprendi is inapplicable. (pp. 29-30)

3. Nor does Watts control. In Watts, the United States Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157. In United States v. Booker, the Court appeared to limit Watts and minimize its precedential value. See 543 U.S. 220, 240 n.4 (2005). Federal courts have broadly held that Watts survived Booker and thus permit reliance on evidence of acquitted conduct by sentencing courts. But the practice of relying on acquitted conduct in sentencing has not gone unquestioned among federal judges, and approaches to the issue among state courts have been decidedly mixed. In People v. Beck, the Supreme Court of Michigan concluded that "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." 939 N.W.2d 213, 216 (Mich. 2019), cert. denied, 140 S. Ct. 1243 (2020). In reaching that conclusion, the Beck court distinguished Watts on the ground that Watts considered the use of acquitted conduct not through the lens of due process, but rather only in "the double-jeopardy context." Id. at 224. The Court agrees with the Michigan Supreme Court that Watts is not dispositive of the due process challenge presented here, and therefore turns to the New Jersey Constitution. (pp. 30-35)

4. The New Jersey Constitution is a source of fundamental rights independent of the United States Constitution. The Federal Constitution provides the floor for constitutional protections, and our own Constitution affords greater protection for individual rights than its federal counterpart. The doctrine of fundamental fairness reflects the State Constitution's heightened protection of due process rights. Despite the absence of the phrase due process in that paragraph, this Court has construed the expansive language of Article I, Paragraph 1 to embrace the fundamental guarantee of due process. An important part of that due process guarantee is the doctrine of fundamental fairness, which serves as an augmentation of existing constitutional protections or as an independent source of protection against state action. Here, the Court applies the doctrine to consider whether acquitted conduct may be considered in sentencing defendants. (pp. 35-38)

5. The New Jersey Constitution's guarantee of the right to a criminal trial by jury is "inviolate." N.J. Const. art. I, ¶ 9. In order to protect the integrity of that right, a jury's verdict cannot be ignored through judicial fact-finding, under the lower preponderance of the evidence standard, at sentencing. Such a practice defies the principles of due process and fundamental fairness. (pp. 38-39)

6. Melvin was convicted of second-degree unlawful possession of a weapon and acquitted of two counts of first-degree murder, second-degree possession of a weapon for

an unlawful purpose, and second-degree aggravated assault. In other words, the jury determined that Melvin had a gun but acquitted him of all charges that involved using the gun -- or even having the purpose to use it unlawfully. Nevertheless, the trial court found by a preponderance of the evidence that Melvin used the firearm "to shoot upon three other human beings." The jury's verdict should have ensured that Melvin retained the presumption of innocence for any offenses of which he was acquitted. (pp. 39-41)

7. And, in finding Paden-Battle guilty of kidnapping, conspiracy to commit kidnapping, and felony murder, the jury's verdict reflected its conclusion, based on the evidence, that the victim's death would not have occurred without the commission of the kidnapping in which Paden-Battle was involved. In finding Paden-Battle not guilty of the remaining offenses, however, the jury rejected the charges that Paden-Battle was guilty of first-degree murder or first-degree conspiracy to commit murder. Notwithstanding the jury's not-guilty verdict as to conspiracy to commit murder and murder, the trial court determined that Paden-Battle had in fact "orchestrated," "was the mastermind," "the supervisor," and "the driving force in this kidnapping and execution." (pp. 41-42)

8. The findings of juries cannot be nullified through lower-standard fact findings at sentencing. The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial. (pp. 42-43)

9. The sentencing court's reliance on Watts was a reasonable approach adopted by a number of other jurisdictions with regard to an issue that this Court had yet to consider. Although the Court finds today -- as is true with regard to many constitutional issues -- that the New Jersey Constitution offers greater protection against the consideration of acquitted conduct in sentencing than does the Federal Constitution, the sentencing court's approach at the time was not unreasonable. Both Melvin and Paden-Battle have requested that their matters be assigned to a different judge should the Court agree that resentencing is appropriate. Although the trial judge's interpretation of Watts was entirely logical and the Court has no doubt that on remand, the trial judge would adhere to the Court's ruling, the Court believes that in this instance, reassigning these matters is the best course when viewing the cases through the eyes of the defendants. (pp. 43-44)

The judgment of the Appellate Division is REVERSED in Melvin and AFFIRMED in Paden-Battle. Both matters are REMANDED for resentencing.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

SUPREME COURT OF NEW JERSEY

A-44 September Term 2019

A-13 September Term 2020

083298 and 084603

State of New Jersey,

Plaintiff-Respondent,

v.

Mark Melvin,

Defendant-Appellant.

State of New Jersey,

Plaintiff-Appellant,

v.

Michelle Paden-Battle, a/k/a
Michelle A. Paden, Mama Michelle,

Defendant-Respondent.

State v. Mark Melvin (A-44-19)
On certification to the Superior Court,
Appellate Division.

State v. Michelle Paden-Battle (A-13-20)
On certification to the Superior Court,
Appellate Division, whose opinion is reported at
464 N.J. Super. 125 (App. Div. 2020).

Argued	Decided
February 1, 2021	September 23, 2021

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant in State v. Mark Melvin (A-44-19) (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the briefs).

Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent in State v. Mark Melvin (A-44-19) (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Matthew E. Hanley, of counsel and on the briefs).

Emily M.M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for appellant in State v. Michelle Paden-Battle (A-13-20) (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Emily M.M. Pirro, of counsel and on the briefs).

Molly O'Donnell Meng, Assistant Deputy Public Defender, argued the cause for respondent in State v. Michelle Paden-Battle (A-13-20) (Joseph E. Krakora, Public Defender, attorney; Molly O'Donnell Meng, of counsel and on the briefs, and Monique Moyse, Designated Counsel, on the briefs).

Sarah D. Brigham, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey in State v. Mark Melvin (A-44-19) and State v. Michelle Paden-Battle (A-13-20) (Gurbir S. Grewal, Attorney General, attorney; Sarah D. Brigham, of counsel and on the brief).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey in State v. Mark Melvin (A-44-19) and State v. Michelle Paden-

Battle (A-13-20) (American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom, Jeanne LoCicero, and Karen Thompson, on the brief).

Joseph A. Hayden, Jr., argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey in State v. Mark Melvin (A-44-19) and State v. Michelle Paden-Battle (A-13-20) (Pashman Stein Walder Hayden, attorneys; Joseph A. Hayden, Jr., and Dillon J. McGuire, on the brief).

Jonathan Romberg argued the cause for amicus curiae Seton Hall University School of Law Center for Social Justice in State v. Michelle Paden-Battle (A-13-20) (Seton Hall University School of Law Center for Social Justice, attorneys; Jonathan Romberg, of counsel and on the brief).

JUSTICE PIERRE-LOUIS delivered the opinion of the Court.

One of the most important tenets of our criminal justice system is the finality of a jury's verdict of acquittal. These consolidated appeals test that principle through a common legal issue: whether a trial judge can consider at sentencing a defendant's alleged conduct for crimes for which a jury returned a not guilty verdict.

In State v. Melvin, the jury found Melvin guilty of second-degree unlawful possession of a handgun and, after two trials, not guilty of the most serious charges against him, including first-degree murder and first-degree attempted murder. At his second sentencing, the trial court -- notwithstanding

the jury's not-guilty verdicts on the murder charges -- determined that the evidence at trial supported the conclusion that Melvin shot the victims. Citing United States v. Watts, 519 U.S. 148 (1997), the trial judge found that it was within the court's broad discretion at sentencing to consider all circumstances of the case, including evidence that Melvin was the shooter. Despite the jury's verdict, the trial court found that Melvin not only possessed the weapon, but used it to shoot three people. The trial court sentenced Melvin to a term of sixteen years' imprisonment with an eight-year period of parole ineligibility. The Appellate Division affirmed that sentence.

In State v. Paden-Battle, in a trial before the same judge who presided over Melvin's case, the jury found Paden-Battle guilty of kidnapping, conspiracy to commit kidnapping, and felony murder. The jury acquitted Paden-Battle of the remaining seven counts, including first-degree murder and conspiracy to commit murder. At sentencing, the trial judge again relied on Watts to make findings of fact, by a preponderance of the evidence, that Paden-Battle, despite having been acquitted of the most serious murder charges, was the mastermind who orchestrated the victim's murder. The trial court stated that Paden-Battle falsified her testimony and found that she was the moving force behind the murder and ordered her co-conspirators to act. The trial court sentenced Paden-Battle to a sixty-year sentence. On appeal, the

Appellate Division vacated Paden-Battle's sentence and remanded the matter for resentencing, holding that the trial court enhanced her sentence based on its belief -- a belief contrary to the jury's verdict -- that Paden-Battle ordered the execution.

We granted the petitions for certification in both cases and now reverse in Melvin and affirm in Paden-Battle. Article I, Paragraph 1 of the New Jersey Constitution bestows upon all citizens certain natural and unalienable rights. From those rights flows the doctrine of fundamental fairness, which "protects against arbitrary and unjust government action." State v. Njango, 247 N.J. 533, 537 (2021). For the reasons stated below, we hold today that fundamental fairness prohibits courts from subjecting a defendant to enhanced sentencing for conduct as to which a jury found that defendant not guilty.

I.

We begin by reviewing the facts and procedural history in State v. Melvin.

A.

In September 2012, a masked man wearing a gray hooded sweatshirt entered a Newark restaurant, where he shot and killed two men and injured a woman, the restaurant's owner and cook. The man fled the scene in a green Dodge Magnum until his vehicle ran out of gas. Soon after, police pulled up

behind the stopped vehicle and found Mark Melvin in the driver's seat along with another individual seated in the passenger's seat.

When police approached, Melvin exited the vehicle and ran, but police quickly apprehended and arrested him. Police searched the area and recovered two non-matching gloves and a gray hooded sweatshirt from backyards Melvin ran through during the chase. Police recovered from Melvin's vehicle an automatic handgun, one hundred decks of heroin, and a black mask consistent with the one used in the homicides. Ballistic testing confirmed that the handgun recovered from the vehicle matched the gun used in the shooting. In addition, DNA testing confirmed that the blood of one of the victims was found on the gray hooded sweatshirt.

On May 31, 2013, an Essex County Grand Jury charged Melvin in a nine-count indictment with the following: first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (Counts I and V); second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b) (Count II); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count III); first-degree attempted murder, N.J.S.A. 2C:5-1 and :11-3 (Count IV); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (Count VI); third-degree unlawful possession of a controlled dangerous substance (CDS) (heroin), N.J.S.A. 2C:35-10(a)(1) (Count VII); third-degree possession of CDS (heroin) with

intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3) (Count VIII); and third-degree unlawful possession of a CDS (heroin) with the intent to distribute within 1,000 feet of a school, N.J.S.A. 2C:35-7 (Count IX).[1]

At trial, the State submitted DNA and ballistic evidence, police testimony, and the testimony of Jahod Marshall, who was the passenger in Melvin's vehicle. Marshall testified that on the morning of the shooting, he was playing basketball when Melvin flagged him down and told him to get into his car. Marshall complied, and the men drove away. Marshall further testified that Melvin parked near the restaurant and exited the car. Marshall then heard gunshots before Melvin rushed back into the vehicle, wearing a gray hooded sweatshirt and carrying a gun, and drove off until the vehicle ran out of gas.

At the conclusion of the trial, the jury found Melvin guilty of second-degree unlawful possession of a handgun, but they remained deadlocked on the outstanding counts. Ordinarily, a second-degree offense carries a potential of five to ten years' imprisonment, but the State motioned the court to sentence Melvin to an extended term based on his criminal history. See N.J.S.A. 2C:44-

[1] The State dismissed Count IV prior to the start of trial.

3(a). Melvin conceded he was eligible for an extended term as a persistent offender, and the court granted the State's motion.

With the discretion to sentence Melvin to an extended term of ten to twenty years, see N.J.S.A. 2C:43-6(a)(1), the trial court sentenced Melvin to the maximum -- an aggregate twenty-year prison term with ten years of parole ineligibility. The sentencing judge cited Watts, 519 U.S. 148 (1997), and State v. Jarbath, 114 N.J. 394, 412 n.4 (1989), in his consideration of Melvin's conduct -- specifically, the evidence relating to the murder charges as to which the jury was hung. The sentencing judge determined that "by a preponderance of the credible evidence at trial, . . . Melvin did in fact use a firearm, which resulted in the death of [the two victims] and the injury to [the restaurant owner]." Melvin subsequently appealed his conviction and sentence.

B.

In an unpublished opinion, the Appellate Division affirmed Melvin's conviction for second-degree unlawful possession of a handgun but remanded the matter for resentencing. The court held that the sentencing judge incorrectly applied Watts and Jarbath and that a judge cannot act as a "thirteenth juror" by "substitut[ing] his judgment for that of the jury." The court further noted that "[t]he judge abused his discretion by finding [Melvin]

was the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision."

Thereafter, this Court denied Melvin's petition for certification and the State's cross-petition. 230 N.J. 597 (2017); 230 N.J. 600 (2017).

C.

At the retrial of the deadlocked counts, Melvin was acquitted on Counts I, III, V, and VI, and the State dismissed Counts VII, VIII, and IX, resolving all remaining charges against Melvin. The same judge who presided over the first trial and sentencing handled Melvin's retrial and resentencing. The judge again cited Watts in his determination that "the evidence at the trial support[ed] a conclusion that [Melvin] was the shooter of the two individuals" at the restaurant. The judge stated that,

> Significantly, this [c]ourt is considering that evidence to determine 1) the aggravating and mitigating factors for sentencing, 2) whether to . . . apply an extended term of imprisonment, and 3) where within the extended term should . . . Melvin be sentenced. This [c]ourt is not relying upon that evidence to impose a sentence for some other charge because no other charge is before this [c]ourt.
>
> Unlike the first trial, . . . Melvin no longer faces the possibility of jeopardy on the acquitted conduct[] as . . . he's been found not guilty of some charges and other charges have been dismissed. This [c]ourt views the consideration of that evidence I just referred to, of . . . Melvin as the shooter, as totally consistent with the

> broad discretion which is accorded to a trial, a sentencing judge when imposing an appropriate sentence in evaluating the whole man and the entire circumstances of the case. That is this [c]ourt's duty. And the [c]ourt . . . , in the exercise of that duty has determined to consider that evidence.

The trial court applied aggravating factors three (risk defendant will commit another crime), six (extent of defendant's prior criminal record and the seriousness of the offense), and nine (the need to deter defendant and others from violating the law). See N.J.S.A. 2C:44-1(a)(3), (6), (9). The court did not apply any mitigating factors. The trial judge noted that "Melvin was on supervised release from his prior federal conviction" when he committed the offense in the present matter. Contrary to the jury's verdict, the trial court added that Melvin "not only . . . possess[ed] said weapon, but he used it to shoot upon three other human beings." The court further reasoned that Melvin's "prior contact with the criminal justice system ha[d] not deterred him," and provided a basis for applying aggravating factor nine. Last, the court found that Melvin's record qualified him as a persistent offender.

The trial court resentenced Melvin to an aggregate extended term of sixteen years with an eight-year period of parole ineligibility.

D.

Melvin appealed again, claiming that (1) he was sentenced for crimes contrary to the jury's verdict; (2) his sentence was excessive; and (3) his judgment of conviction needed to be amended to reflect his jail credits.

In an unpublished decision, the Appellate Division affirmed Melvin's sixteen-year extended term sentence. Citing State v. Tillery, 238 N.J. 293 (2019), the court rejected Melvin's argument that the sentencing judge "double-counted by considering evidence of the homicides and aggravated assault in finding the aggravated sentencing factors." The panel further reasoned that the sentencing

> judge properly determined [Melvin] was eligible for an extended term based upon his four prior convictions. The [sentencing] judge then weighed the aggravating sentencing factors by considering not only [Melvin]'s prior record, but also the nature of the offense and "other aspects of . . . [Melvin]'s record." State v. Dunbar, 108 N.J. 80, 92 (1987).
>
> [(omission in original).]

Ultimately, the court concluded that Tillery "dispose[d] of defendant's argument."

We granted Melvin's petition for certification, "limited to the issue of whether the sentencing judge could consider defendant's conduct even though the jury acquitted defendant of the underlying crimes." 240 N.J. 549 (2020).

II.

We next turn our attention to State v. Paden-Battle, and we rely on the testimony at trial for the following summary.

A.

This case arises from the kidnapping and murder of Bloods street gang member Regina Baker. Baker was a member of the Mob Piru set of the Piru Bloods in Jersey City but had previously been part of the Lueders Park Piru (LPP) set out of Newark. At the time of her murder, Baker lived in Jersey City with her children and Natassia Hernandez.

According to several witnesses, defendant Paden-Battle, known as "Mama L,"[2] was a member of the LPP set based in Newark.[3] Witnesses testified that Paden-Battle was a "First Lady," the highest rank in a gang for a female member. Paden-Battle, however, maintained throughout trial that she was not a gang member at all. Witnesses stated that, as First Lady, defendant had control over the gang members ranked below her and could tell them what to do. Cierra Long was one of defendant's "pups," or a subordinate ranking below defendant. Davia Younger -- another one of defendant's "pups" in LPP

[2] Defendant is also referred to as "Momma Elm" in the briefs and transcripts.

[3] This set is often also referred to as "Looters Park" in the briefs and transcripts.

-- testified that if you disobeyed the First Lady, you would get disciplined or beaten up.

Omar Martin was also a member of the LPP and held the rank of "G." Martin testified that First Lady and "G" are about the same rank. Karon Adams, another member of the Bloods, fired the gun shots that killed Baker, according to witnesses. In addition, Martin's friend, Damon Zengotita, was the driver on the day in question and used the evening as his gang initiation.

The incident that led to Baker's murder involved Baker allegedly committing the very serious gang offense of "false claiming" -- lying about her rank in the gang. As a result of her "false claiming," Baker was labeled "food," which meant that she was someone to be killed or beaten up on sight.

The State and Paden-Battle's versions of the events on the night of Baker's murder differ significantly.

The State's Version of Events

On June 16, 2012, Paden-Battle, Long, Martin, Adams, and Zengotita drove from Paden-Battle's house in Newark to Jersey City in search of Baker. Witnesses testified that Paden-Battle wanted to settle the issues with Baker that night and sought to bring Baker back to Newark. When the group arrived in Jersey City, they asked around to determine Baker's whereabouts and were

directed to the home of Natassia Hernandez. The group met up with Younger while in Jersey City.

While en route to Hernandez's residence, Paden-Battle called Hernandez on the phone, told her that she knew that Baker was at Hernandez's residence, and demanded that Hernandez "tell that b---- to come outside, get the f--- out, kick her out your house or something" -- "[m]an that b---- know she's dead, I ain't off that s--- . . . [y]o, I'm not leaving here 'til I get this b---- tonight, like this going to end tonight with that b----."

When the group arrived at Hernandez's residence, an argument ensued between Paden-Battle and Hernandez, with Paden-Battle continuing her demand that Baker come out of the house. Baker eventually came downstairs, but remained inside the doorway of the home as she proceeded to argue with Paden-Battle. At one point during the argument, Martin and Adams walked away from the house and Martin testified that he obtained a gun from Adams. Martin testified that he was getting agitated that the argument between Paden-Battle and Baker was taking so long, so he pointed the gun at Baker's head and, along with Adams, forcibly pulled Baker onto the street toward the car. Martin and Adams then forced Baker into the trunk of the car against her will. As Baker struggled to break free, Martin struck Baker with the butt of the gun twice, while Younger assisted by closing the trunk. According to Hernandez,

Paden-Battle then commanded her co-conspirators to "get the f--- in the car." The events outside of Hernandez's home were all captured on video surveillance camera, but there was no audio on the recording.

On the ride back to Newark, Paden-Battle was concerned that Baker had a cell phone on her. She instructed the driver to pull the car over, and then Paden-Battle, Adams, and Martin got out of the car and opened the trunk. Martin held a gun to Baker and demanded her phone. Although she initially refused, Baker complied after Martin clicked his gun at her. Baker handed the phone to Paden-Battle and either Paden-Battle or Adams threw Baker's cell phone into a nearby body of water. The group then drove to Newark.

Once in Newark, the group displayed Baker, who was still in the trunk, to a group of people near a housing project. According to Martin, Paden-Battle told him and Adams to "handle the situation," which Martin understood to mean that he was to kill Baker. Paden-Battle, Long, and Younger went back to Paden-Battle's home as Martin, Adams, and Zengotita drove away with Baker in the trunk.

The men took Baker to an abandoned townhouse on South 15th Avenue in Newark. Baker pleaded with Adams not to kill her, but Adams took Baker inside the townhouse and shot her five times in the back, torso, and arms. Martin hid the gun and the three men drove back to Paden-Battle's house "to

let her know the situation was handled." Younger testified that Paden-Battle proclaimed that she would take the charges if any criminal charges resulted from the incident. Martin, Long, and Younger all testified for the State and claimed that Paden-Battle orchestrated Baker's kidnapping and murder.

The next day, Paden-Battle was informed that someone was cooperating with the police, and, in response, she met with Martin and ordered him to cut his dreadlocks. Baker's body was discovered by law enforcement two days later in the early morning hours of June 19, 2012 in the abandoned townhouse. That same day, Long went to the police and gave a statement. While Long was in a police vehicle en route to the police station, Paden-Battle called her to inform her that the police "found it" and that Paden-Battle was "changing [her] number." Long also testified that Paden-Battle saw the police raid Paden-Battle's home while she was next door visiting a friend.

On June 26, 2012, Paden-Battle was arrested by the police in Newark.

Paden-Battle's Version of Events

According to Paden-Battle, she was not a member of any gang and was simply friends with people in the neighborhood who were in gangs. Paden-Battle testified that her only role in the Jersey City altercation was that she was there to "try . . . [and] diffuse the situation" with Baker, Long, and Younger. Paden-Battle testified it was her understanding that there was a rift between

Long and Baker that started when Baker's friends spat on Long and tried to beat Long up when Long was with her daughter. Because Long was living with Paden-Battle at the time, Paden-Battle claimed she was privy to the constant arguing over the phone among Long, Younger, and Baker and wanted to help bring an end to the issue.

Paden-Battle stated that when the group arrived in Jersey City, an argument ensued between Martin and Baker outside of Hernandez's home. It was at that point that Martin pulled out a gun, put it to Baker's head, and forced Baker into the trunk of the car. Paden-Battle further claimed that Martin forced her into the car by pointing a gun in her direction. Paden-Battle testified that she was scared and started crying in the car, at which point Martin yelled at her and everyone in the car and told them all to "shut the f--- up." Paden-Battle further testified that, following the incident, she fled her apartment with her daughter and stayed with her boyfriend because she was afraid that Martin would come and kill her and the other women.

B.

On March 13, 2015, an Essex County Grand Jury indicted Paden-Battle[4]

[4] Co-defendant Martin was indicted on eleven counts, including all of the counts charged against Paden-Battle. Co-defendant Zengotita was indicted on Counts I, II, and VI through X.

for second-degree conspiracy to commit kidnapping, N.J.S.A. 2C:5-2 (Count I); first-degree kidnapping, N.J.S.A. 2C:13-l(b)(l) (Count II); first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 (Count VI); first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (Count VII); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (Count VIII); second-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b) (Count IX); second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count X); and first-degree gang criminality, N.J.S.A. 2C:33-29 (Count XI). Prior to trial, the court dismissed Count XI.

A jury trial began on April 13, 2017, with Martin, Long, and Younger each cooperating as State's witnesses.[5] The trial was conducted before the same judge in Essex County who presided over Mark Melvin's trials and sentencings.

After the State rested its case-in-chief, Paden-Battle's counsel moved for a judgment of acquittal on the murder charges, but the motion was denied. On May 3, 2017, the jury convicted Paden-Battle on the charges of kidnapping, conspiracy to commit kidnapping, and felony murder, and acquitted Paden-

[5] Martin and Adams pleaded guilty to kidnapping, conspiracy to commit murder, aggravated manslaughter, and unlawful possession of a handgun. Younger and Long pleaded guilty to conspiracy to commit kidnapping.

Battle of first-degree murder, conspiracy to commit murder, and both weapons offenses.

C.

On August 4, 2017, at Paden-Battle's sentencing hearing, the trial court merged the kidnapping and conspiracy to commit kidnapping charges with the felony murder charge. For the felony murder conviction, Paden-Battle faced 30 years to life imprisonment. Counsel for Paden-Battle asked the trial court to consider that Adams, who shot and killed Baker, would receive a twenty-year sentence and Martin, who was with Adams at the shooting, would receive a twenty-three-year sentence at most.[6] Counsel for Paden-Battle requested that the court sentence Paden-Battle to the statutory minimum of thirty years.

Despite Paden-Battle's plea for leniency, the trial court imposed a sixty-year sentence pursuant to NERA and the Graves Act, N.J.S.A. 2C:43-6(c). The trial court noted that Paden-Battle's refusal to admit any responsibility for the acts that ended in Baker's murder was the reason for the extended sentence. The trial judge also stated,

> Where defendant, having an opportunity to speak, not just to the [c]ourt but to the family of the deceased. Continues that she did not know what was going on. That she denies responsibility for the acts that resulted in the murder of Regina Baker. And this total lack of appreciation for what one human being can do to

[6] Adams and Martin both ultimately received twenty-year sentences.

> another marks this case as the most glaring indictment of how poorly human beings can treat each other.
>
> The facts established during this trial and I find it by reliable evidence having had the opportunity, the privilege indeed to sit in this trial. That yes, Michelle Paden-Battle did not pull the trigger, five times, that resulted in the death of Ms. Baker. However, were it not for Michelle Paden-Battle I am convinced that Regina Baker would be alive today. Because Michelle Paden-Battle set forth a series of events. She orchestrated, she was the master mind, she was the supervisor, she was the driving force in this kidnapping and execution of Regina Baker.

The trial judge further noted,

> And for what reason . . . does the evidence [show] that human life was taken, because Regina Baker misrepresented her stain or her rank within the Bloods. And for that mis-representation of rank, Michelle Paden-Battle who [is] the first lady of [LPP] . . . , they said to the Bloods determined in the exercise of her apparent authority within the Bloods that Regina Baker was food and that her life shall cease.
>
> In executing those orders Ms. Paden-Battle summoned her co-conspirators to her house. They went to Jersey City. And those co-conspirators included the muscle which was, Omar Martin and Karon Adams. She summoned one of her pups that was [C]ierra Long . . . who's testimony completely undermines any claim that the defendant is not a Bloods member.
>
> In fact the PSI reflects that the Piru tattoo is on her neck. And so she got [on] the stand and testified in front of a jury that she was not a member of the Bloods. She was not a gang member when she had that tattoo on

> her neck. And that's not the only time she lied on the stand, I'll get to that.[7]

The trial court analyzed the aggravating and mitigating factors and determined that aggravating factors three, five (N.J.S.A 2C:44-1(a)(5), substantial likelihood that the defendant is involved in organized criminal activity), six, and nine applied. The court also applied mitigating factor seven, N.J.S.A 2C:44-1(b)(7) (no criminal history or substantial period of time since last criminal act). Specifically, in its finding of aggravating factor three -- risk of committing another crime -- the trial court found it

> clearly applicable as the defendant ha[d] not accepted responsibility for her criminal conduct . . . .
>
> Clearly the defendant's exercise of her constitutional right to jury trial does not necessarily equate with a denial of responsibility. She could have simply left the State to its proofs. However, reliable evidence before this [c]ourt establishes that the defendant falsely testified before the jury and otherwise sought to obstruct the investigation and prosecution of the matter.
>
> During the trial the defendant testified that she sought to act as a peace maker. And that she was not a gang member and she did not intercede on Ms. Baker's behalf . . . because Omar Martin posed a -- pointed a handgun at her. Each of these claims is demonstrably false.

[7] Neither the State nor defense counsel mentioned the appearance of the Bloods tattoo during the trial.

The trial judge further stated that the reliable evidence showed Paden-Battle falsified her testimony and that she "was the moving force behind this senseless act of brutality."

After detailing findings to support the other applicable factors, the court turned to Paden-Battle's argument that Martin and Adams should be assessed more culpability, stating that

> the defendant is more culpable due to her supervisory role over these co-defendants and the commission of the kidnapping and homicide. . . . [S]he was clearly -- she was clearly orchestrating the events, providing instruction. She was in charge. Although she did not pull the trigger. They did so on her orders.

The trial court found any disparity in sentencing for Martin and Adams justifiable because Martin and Adams both accepted responsibility for their crimes, pled guilty, and assisted in the prosecution of the other actors. As a result, the sentencing judge determined that the aggravating factors strongly outweighed the lone mitigating factor and justified Paden-Battle's sixty-year prison term.

D.

On appeal, the Appellate Division affirmed Paden-Battle's convictions but vacated her sentence and remanded the matter for resentencing. State v. Paden-Battle, 464 N.J. Super. 125, 131 (App. Div. 2020). Paden-Battle argued that (1) the jury instructions were erroneous, (2) the trial court failed to

properly instruct the jury on her two defenses, and (3) her sentence was excessive and based on improper considerations. Ibid. The Appellate Division determined that

> the judge sentenced defendant based on his own view of the evidence, finding that even though defendant "did not pull the trigger," others did "on her orders" . . . . The State candidly acknowledges that this is what the judge did, arguing in its brief that "[i]t was not improper for [the judge] to credit evidence that the jury did not." We disagree.
>
> [Id. at 146-47 (alterations in original) (footnote omitted).]

The court concluded that there was "no doubt that the sentence was enhanced because the judge believed defendant ordered Baker's execution," "despite the jury verdict, [and] enhanced the sentence imposed." Id. at 151.

We granted the State's petition for certification, limited to the sentencing issue. 244 N.J. 233 (2020). We also denied Paden-Battle's cross-petition for certification. 244 N.J. 257 (2020). We granted amicus curiae status to the American Civil Liberties Union of New Jersey (ACLU), the Association of Criminal Defense Lawyers of New Jersey (ACDL), and the Seton Hall University School of Law Center for Social Justice (Center for Social Justice). The Attorney General, having participated as an amicus before the Appellate Division in Paden-Battle's matter, has continued to participate in that case and also moved successfully to appear as an amicus in Melvin's case.

III.

Because the parties' arguments are substantially similar in both cases, we consider them together.

A.

Defendants argue that sentencing based on acquitted conduct violated their federal and state constitutional rights to due process and fundamental fairness. Defendants assert that punishing a person for conduct of which a jury acquitted them violates the protection afforded by acquittal and undermines the purpose of a jury trial.

More specifically, Melvin contends that acquitted conduct evaluated under the preponderance-of-the-evidence standard violated due process, contrary to Apprendi v. New Jersey, 530 U.S. 466 (2000). Melvin requests that this Court join states like Michigan, Hawaii, North Carolina, New Hampshire, and Georgia in prohibiting a trial court from using acquitted conduct to determine a defendant's sentence. Lastly, because he has already served eight years in prison, Melvin asks this Court to sentence him to time served or remand his matter for resentencing before a different judge.

Paden-Battle argues that the Appellate Division correctly determined that the trial judge unlawfully sentenced her for acquitted conduct and urges

this Court to affirm that ruling. Paden-Battle also requests that her case be remanded for sentencing before a different judge.

B.

The ACLU argues that the present matters raise policy concerns, due process issues, and undermine the import of jury verdicts. The ACLU contends that punishing defendants for acquitted conduct increases pressure on defendants to plead guilty by distorting trial strategy and forcing defendants to influence two different decision makers -- the judge and the jury. The ACLU asserts that, although New Jersey defendants are rarely punished for acquitted conduct, and it is their organization's understanding that only one Superior Court judge in Essex County adheres to the practice, this Court should make clear that the New Jersey Constitution does not allow sentencing under such circumstances.

The ACDL argues that a trial court's reliance on an aggravating factor inconsistent with the jury verdict violates the essence of Apprendi and the New Jersey Constitution. The ACDL notes that seven current and former Supreme Court justices, as well as numerous federal and state court judges, have expressed concerns about Watts. Finally, the ACDL asserts that the New Jersey Constitution is a source of fundamental rights, not dependent on federal case law or the United States Constitution.

The Center for Social Justice supports Paden-Battle's position, arguing that the Sixth Amendment bars a judge from usurping the jury's fact-finding role. The Center for Social Justice also argues that sentencing based on acquitted conduct violates the New Jersey Constitution, principles of fundamental fairness, due process, and the right to fair notice.

C.

The State submits that a judge may sentence a defendant within the sentencing guidelines based on relevant aggravating and mitigating factors supported by "competent, credible evidence in the record." The State notes that sentencing judges have far-ranging discretion as to what sources and types of evidence they may use to sentence defendants. According to the State, the sentencings in these cases are both valid under Watts. Moreover, the State asserts that no constitutional mandates are violated by allowing judges to consider acquitted conduct in sentencing determinations. The State further submits that California, Pennsylvania, Connecticut, Illinois, Missouri, and Alaska permit judges to consider acquitted conduct or conduct related to unadjudicated arrests in assessing punishment. The State also argues that Apprendi does not apply to these cases because defendants were not sentenced beyond the prescribed statutory maximum for their counts of conviction. The

State urges this Court to affirm the Appellate Division's decision in Melvin's matter and reverse the Appellate Division's ruling in Paden-Battle's case.

The Attorney General joins the State in this matter and asserts that acquitted conduct should be considered to assess the "whole person," which includes details of the underlying offense. The Attorney General avers that a judge has broad discretion in sentencing a defendant within the range permitted by the jury verdict. Regarding Paden-Battle, the Attorney General argues that considering the evidence that underlies an acquitted charge does not present a double-jeopardy issue because a court is permitted to increase a defendant's punishment based on the manner in which she committed her convicted crime. Lastly, the Attorney General contends that the judge appropriately balanced the sentencing factors and properly sentenced Paden-Battle.

IV.

A.

Although "[a]ppellate review of sentencing is deferential," that deference presupposes and depends upon the proper application of sentencing considerations. State v. Case, 220 N.J. 49, 65 (2014). This appeal challenges not the application of permissible considerations, but rather the permissibility of the considerations the sentencing court applied. Whether the consideration

of acquitted conduct in sentencing a defendant comports with the New Jersey Constitution is a question of law, and our review is therefore de novo. See Tillery, 238 N.J. at 314.

B.

We begin our analysis by clarifying its scope. Much of the oral argument and briefing in these matters focused on Watts and Apprendi, but we find that neither case controls here.

Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee all criminal defendants the right to a jury trial and -- under both Constitutions -- due process requires that the prosecution "prove each element of a charged crime beyond a reasonable doubt." State v. Hill, 199 N.J. 545, 558-59 (2009) (citing In re Winship, 397 U.S. 358, 364 (1970), with regard to the United States Constitution and State v. Anderson, 127 N.J. 191, 200-01 (1992), with regard to the State Constitution). That burden is underscored through "special weight" conferred by a jury's acquittal. United States v. DiFrancesco, 449 U.S. 117, 129 (1980). Not only are defendants protected from being tried a second time for an offense for which they have been acquitted, see U.S. Const. amend V; N.J. Const. art. I, ¶ 11, but, significantly, an acquitted defendant retains the presumption of innocence, DiFrancesco, 449 U.S. at 129. Indeed, a

"jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." Yeager v. United States, 557 U.S. 110, 122 (2009). Thus, "[e]ven if the verdict is 'based upon an egregiously erroneous foundation,' Fong Foo v. United States, 369 U.S. 141, 143 (1962), its finality is unassailable," Yeager, 557 U.S. at 122-23. In Apprendi and Watts, the United States Supreme Court distinguished discretionary sentencing determinations from the adjudication of elements of an offense with respect to acquitted conduct.

In Apprendi, the Court examined New Jersey's "hate crime" statute, which allowed a judge to impose an "enhanced" sentence based upon a judicial finding by a preponderance of the evidence that the defendant intended to intimidate the victim for racial reasons. 530 U.S. at 468-70. The defendant pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose, as well as to a lesser charge. Id. at 469-70. On the second-degree charges to which he pled guilty, he faced a prison term of five to ten years. Id. at 470. Under the "hate crime" statute, the judge was empowered to sentence defendant to effectively one degree higher, within the range of ten to twenty years, provided the judge found the crime was committed "with a purpose to intimidate an individual or group of individuals" for reasons such as race or color. Id. at 468-69.

After a sentencing hearing, the trial judge determined that a preponderance of the "evidence supported a finding that the crime was motivated by racial bias"; therefore, the judge imposed a twelve-year prison term, which was two years more than the maximum sentence for a second-degree crime. Id. at 470-71 (quotation omitted). The Apprendi Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Finding the hate crime statute to be "an unacceptable departure from the jury tradition," the Court declared the defendant's sentence unconstitutional. Id. at 497. The Court noted, however, that when imposing a sentence within the statutory limits, judges may still consider the traditional factors relating to the crime and the offender. Id. at 481.

Here, because neither defendant was sentenced above the statutory maximum for their counts of conviction, Apprendi is inapplicable.

Nor does Watts control. The sentencing court here relied on Watts in considering conduct for which defendants were acquitted. In Watts, the United States Supreme Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."

519 U.S. at 157. Stressing that convictions require proof beyond a reasonable doubt, whereas sentencing factors require proof by only a preponderance of the evidence, the Watts Court observed that "an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." Id. at 156 (quoting Dowling v. United States, 493 U.S. 342, 349 (1990)), in which the Court noted that acquitted conduct could nevertheless be presented as evidence under Fed. R. Evid. 404(b)). The Watts Court also emphasized the uncertainty inherent in a jury's acquittal, explaining that "it is impossible to know exactly why a jury found a defendant not guilty on a certain charge," and therefore, the "jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty." Id. at 155.

In United States v. Booker, the Court appeared to limit Watts and minimize its precedential value. See 543 U.S. 220, 240 n.4 (2005) ("Watts, in particular, presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument. It is unsurprising that we failed to consider fully the issues presented to us in these cases." (citing 519 U.S. at 171 (Kennedy, J., dissenting))). Federal courts have broadly held that Watts survived Booker and thus permit reliance on evidence of acquitted conduct by

sentencing courts. See Eang Ngov, Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing, 76 Tenn. L. Rev. 235, 258-60 & nn. 142-52 (2009).

But the practice of relying on acquitted conduct in sentencing has not gone unquestioned among federal judges. See, e.g., United States v. Brown, 892 F.3d 385, 415 (D.C. Cir. 2018) (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness . . . ."); id. at 408 (Millett, J., concurring) (agreeing that Circuit precedent compelled the court's conclusion but writing separately to stress that "the constitutionally troubling use of acquitted conduct" to increase a sentence "guts the role of the jury in preserving individual liberty and preventing oppression by the government"); United States v. Canania, 532 F.3d 764, 778 (8th Cir. 2008) (Bright, J., concurring) (noting that "the consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding" and wondering "what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing").

And approaches to the issue among state courts have been decidedly mixed. Some courts have followed Watts in some form. See, e.g., In re Coley,

283 P.3d 1252, 1275 (Cal. 2012) ("Both the United States Supreme Court and this court have expressly held that a trial court, in exercising its discretion in sentencing a defendant on an offense of which he or she has been convicted, may take into account the court's own factual findings with regard to the defendant's conduct related to an offense of which the defendant has been acquitted, so long as the trial court properly finds that the evidence establishes such conduct by a preponderance of the evidence."); State v. Jaco, 156 S.W.3d 775, 780 (Mo. 2005) (holding that, because a defendant's sentence was within the original unenhanced range of punishment, "any facts that would have tended to assess her punishment within that range were not required to be found beyond a reasonable doubt by a jury"); State v. Longo, 608 N.W.2d 471, 474-75 (Iowa 2000) (adopting the logic of Watts based on Iowa's prior recognition of the "lower standard of proof at the sentencing stage").

Other courts, however, have declined to follow Watts. See, e.g., State v. Cote, 530 A.2d 775, 784 (N.H. 1987) (holding that a sentencing court cannot consider acquitted conduct in rendering its sentence, because the presumption of innocence is "not to be forgotten after the acquitting jury has left, and sentencing has begun"); State v. Koch, 112 P.3d 69, 79 (Haw. 2005) (holding that the circuit court had erred by assuming, in sentencing the defendant, that

he "had engaged in unlawful conduct of which he had been expressly acquitted").

In People v. Beck, the Supreme Court of Michigan concluded that "[o]nce acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime." 939 N.W.2d 213, 216 (Mich. 2019), cert. denied, 140 S. Ct. 1243 (2020). The court explained that

> when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent. "To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself."
>
> [Id. at 225 (quoting State v. Marley, 364 S.E.2d 133, 139 (N.C. 1988)).]

In reaching that conclusion, the Beck court distinguished Watts on the ground that Watts considered the use of acquitted conduct not through the lens of due process, but rather only in "the double-jeopardy context." Id. at 224. The court also determined that case law relating to uncharged conduct was inapposite with respect to acquitted conduct. Id. at 221-24. The Beck court thus declared that it would consider the question of due process "on a clean slate." Id. at 224-25; accord id. at 226 ("[W]e do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on

acquitted conduct at sentencing is barred by the Fourteenth Amendment."); see also Commonwealth v. Howard, 677 N.E.2d 233, 236 (Mass. App. Ct. 1997) (noting that Watts applied the federal sentencing guidelines and that its holding as to acquitted conduct did not affect application of Massachusetts's sentencing scheme).

We agree with the Michigan Supreme Court that Watts is not dispositive of the due process challenge presently before this Court. As clarified in Booker, Watts was cabined specifically to the question of whether the practice of using acquitted conduct at sentencing was inconsistent with double jeopardy. We therefore turn to the New Jersey Constitution in our due process analysis.

C.

The New Jersey Constitution is a source of fundamental rights independent of the United States Constitution. See State v. Gilmore, 103 N.J. 508, 522-23 (1986) (holding that the New Jersey Constitution, independent of the United States Constitution, protected the right to a trial by jury by forbidding the exclusion of black jurors by use of peremptory challenges). The Federal Constitution provides the floor for constitutional protections, and our own Constitution affords greater protection for individual rights than its federal counterpart. Id. at 522-24, 45; see also State v. Carter, 247 N.J. 488,

529-30 (2021) (collecting cases and noting that this Court has found that our State Constitution offers greater protection than the Fourth Amendment from unreasonable searches and seizures "[o]n a number of occasions"); State v. Zuber, 227 N.J. 422, 438 (2017) ("As in other contexts, the State Constitution can offer greater protection in [the Eighth Amendment] area than the Federal Constitution commands."). The doctrine of fundamental fairness reflects the State Constitution's heightened protection of due process rights.

Article I, paragraph 1 of the New Jersey Constitution provides that

> [a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

"Despite the absence of the phrase due process in that paragraph, this Court has 'construed the expansive language of Article I, Paragraph 1 to embrace the fundamental guarantee of due process.'" Njango, 247 N.J. at 548 (quoting Jamgochian v. State Parole Bd., 196 N.J. 222, 239 (2008)). An important part of that due process guarantee is the doctrine of fundamental fairness.

Fundamental fairness is "often extrapolated from or implied in other constitutional guarantees." State v. Yoskowitz, 116 N.J. 679, 731 (1989). The doctrine "can be viewed as an integral part of the right to due process," State v. Abbati, 99 N.J. 418, 429 (1985), because it "serves to protect citizens

generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily," State v. Saavedra, 222 N.J. 39, 67 (2015) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995)).

This Court has applied the doctrine of fundamental fairness "'sparingly' and only where the 'interests involved are especially compelling'; if a defendant would be subject '"to oppression, harassment, or egregious deprivation,"' it is [to] be applied." Ibid. (quoting Doe, 142 N.J. at 108). The doctrine of fundamental fairness has been invoked in criminal cases "when the scope of a particular constitutional protection has not been extended to protect a defendant." Yoskowitz, 116 N.J. at 705. "Thus, even in circumstances not implicating violations of constitutional rights our courts have imposed limitations on governmental actions on grounds of fundamental fairness." State v. Cruz, 171 N.J. 419, 429 (2002); see also Njango, 247 N.J. at 537 (holding that fundamental fairness required that the excess time defendant erroneously served in prison be credited to reduce his parole supervision term under NERA); State v. Tropea, 78 N.J. 309, 315-16 (1978) (finding that a defendant's retrial on a motor vehicle speeding charge was barred by principles of fundamental fairness where the reversal of the defendant's earlier conviction was based on the State's failure to prove the applicable speed

limit); Rodriguez v. Rosenblatt, 58 N.J. 281, 294-96 (1971) (holding that indigent municipal court defendants facing charges that could result in a sentence of imprisonment or another "consequence of magnitude" must be granted the right to counsel based on principles of fundamental fairness).

The doctrine serves as "an augmentation of existing constitutional protections or as an independent source of protection against state action." Doe, 142 N.J. at 108 (quoting State v. Ramseur, 106 N.J. 123, 377 (1987) (Handler, J., dissenting)). Here, we apply the doctrine to consider whether acquitted conduct may be considered in sentencing defendants.

V.

Our Constitution's guarantee of the right to a criminal trial by jury is "inviolate." N.J. Const. art. I, ¶ 9. In order to protect that right, we cannot allow the finality of a jury's not-guilty verdict to be put into question. To permit the re-litigation of facts in a criminal case under the lower preponderance of the evidence standard would render the jury's role in the criminal justice process null and would be fundamentally unfair. In order to protect the integrity of our Constitution's right to a criminal trial by jury, we simply cannot allow a jury's verdict to be ignored through judicial fact-finding at sentencing. Such a practice defies the principles of due process and fundamental fairness.

Justice Scalia noted as much in Blakely v. Washington, 542 U.S. 296 (2004). In Blakely, the United States Supreme Court refined Apprendi by clarifying what constituted the statutory maximum for sentencing purposes. Id. at 301-02. Although Blakely is thus tangential to our analysis, a hypothetical posed by Justice Scalia resonates strongly with the matters before this Court. In questioning critics of Apprendi, the Court challenged the idea that if a fact is labeled by the Legislature as a sentencing factor, it may be found by the judge no matter how much the punishment is increased as a result of the finding; in the Court's view, such a proposition would mean

> that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it -- or of making an illegal lane change while fleeing the death scene. Not even Apprendi's critics would advocate this absurd result.
>
> [Id. at 306.]

Justice Scalia's hypothetical predicted the untenable situation in which Melvin finds himself. Melvin was convicted of second-degree unlawful possession of a weapon and acquitted of two counts of first-degree murder, second-degree possession of a weapon for an unlawful purpose, and second-degree aggravated assault. In other words, the jury determined that Melvin had a gun but acquitted him of all charges that involved using the gun -- or even having the purpose to use it unlawfully. Nevertheless, the trial court, in

applying aggravating factor six, found by a preponderance of the evidence that Melvin used the firearm "to shoot upon three other human beings." The absurd result that the Blakely hypothetical predicted came to be in Melvin's case.

The jury found Melvin guilty of unlawful possession of a handgun. The instructions for that offense explain that, to convict, the jury would have needed to find only the following elements beyond a reasonable doubt: "(1) That there was a handgun; (2) That the defendant knowingly possessed the handgun; and (3) That the defendant did not have a permit to possess such a weapon." Model Jury Charges (Criminal), "Unlawful Possession of a Handgun (Second Degree)" (N.J.S.A. 2C:39-5(b)) (rev. June 11, 2018). To convict Melvin of unlawful possession, the jury did not make any finding as to whether he used the handgun he possessed.

And in acquitting Melvin of any offenses that involved using the weapon -- or even of having had the "purpose to use the firearm unlawfully," see Model Jury Charges (Criminal), "Possession of a Firearm with a Purpose to Use it Unlawfully Against the Person or Property of Another" (N.J.S.A. 2C:39-4(a)) (rev. Oct. 22, 2018) -- the jury's verdict should have ensured that Melvin retained the presumption of innocence for any offenses of which he was acquitted. That the jury's verdict here served as "a mere preliminary to a

judicial inquisition into the facts of the crime that the State actually [sought] to punish," is an absurd and unfair result indeed. See Blakely, 542 U.S. at 306.

Although the facts in Paden-Battle's case are not as on point with the Blakely hypothetical as Melvin's case, the same absurdity presents itself in her matter. Paden-Battle was convicted of kidnapping, conspiracy to commit kidnapping, and felony murder. For the felony murder count, the trial court instructed that the "State does not contend that [Paden-Battle] killed Regina Baker by her own hand," but that "Regina Baker was shot and killed while [Paden-Battle], alone or . . . with one or more other persons[,] was engaged in the commission of or attempt or flight after committing the crime of kidnapping charged in Count 2 of the indictment." In finding Paden-Battle guilty of kidnapping, conspiracy to commit kidnapping, and felony murder, the jury's verdict reflected its conclusion, based on the evidence, that the victim's death would not have occurred without the commission of the kidnapping in which Paden-Battle was involved.

In finding Paden-Battle not guilty of the remaining offenses, however, the jury rejected the charges that Paden-Battle was guilty of first-degree murder or first-degree conspiracy to commit murder. Significantly, the jury was instructed that to convict Paden-Battle of conspiracy to commit murder, it would have to find

> 1. That [Paden-Battle] agreed with another person or persons that they or one or more of them would engage in conduct that constitutes the crime of murder; and
>
> 2. That the defendant's purpose was to promote or facilitate the commission of the crime of murder.

But the jury found that the evidence failed to establish one or both of those elements beyond a reasonable doubt and thereby restored the presumption of Paden-Battle's innocence as to the conspiracy charge.

Notwithstanding the jury's not-guilty verdict as to conspiracy to commit murder and murder, the trial court determined that Paden-Battle had in fact "orchestrated," "was the mastermind," "the supervisor," and "the driving force in this kidnapping and execution of Regina Baker." The trial court further noted that Paden-Battle was more culpable, and therefore deserving of a much longer sentence, than the individuals who pulled the trigger because of her "supervisory role over these co-defendants" and because "[s]he was in charge. Although she did not pull the trigger. They did so on her orders." For those reasons -- reasons that go to the heart of the conduct for which the jury returned a not guilty verdict -- the trial court sentenced Paden-Battle to sixty years in prison.

We hold that the findings of juries cannot be nullified through lower-standard fact findings at sentencing. The trial court, after presiding over a trial and hearing all the evidence, may well have a different view of the case than

the jury. But once the jury has spoken through its verdict of acquittal, that verdict is final and unassailable. The public's confidence in the criminal justice system and the rule of law is premised on that understanding. Fundamental fairness simply cannot let stand the perverse result of allowing in through the back door at sentencing conduct that the jury rejected at trial.

VI.

In both cases here, the sentencing court made clear its reliance on Watts in considering the acquitted conduct to enhance the sentences imposed on Melvin and Paden-Battle. That reliance was a reasonable approach adopted by a number of other jurisdictions with regard to an issue that this Court had yet to consider. Although we have found today -- as is true with regard to many constitutional issues -- that our State Constitution offers greater protection against the consideration of acquitted conduct in sentencing than does the Federal Constitution, the sentencing court's approach at the time was not unreasonable.

Both Melvin and Paden-Battle have requested that their matters be assigned to a different judge should this Court agree that resentencing is appropriate. Again, we find that the trial judge's interpretation of Watts entirely logical and we have no doubt that on remand, the trial judge would adhere to this Court's ruling. We do, however, believe that in this instance,

reassigning these matters is the best course when viewing the cases through the eyes of the defendants. In Melvin's case in particular, this will be the third time he is sentenced. He has already been paroled and will be appearing before the same judge for the third time on the issue of sentencing after yet another remand in his case. Viewing the proceedings from the defendant's perspective, it might be difficult to comprehend how the same judge who has twice sentenced him could arrive at a different determination at a third sentencing. Therefore, we order that both matters be reassigned on remand.

VII.

For the foregoing reasons, the judgment of the Appellate Division in State v. Melvin is reversed and the matter is remanded for resentencing. We affirm the judgment of the Appellate Division in State v. Paden-Battle that vacated the sentence and remanded for resentencing. The Essex County Assignment Judge shall reassign both cases on remand.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

SUPREME COURT OF NEW JERSEY
DOCKET NOS. 082858 & 085146 (A-39/40-20)

STATE OF NEW JERSEY *Plaintiff-Petitioner*, **v.** **PETER NYEMA** *Defendant-Respondent*. **AND** **STATE OF NEW JERSEY** *Plaintiff-Respondent*, **v.** **JAMAR J. MYERS** *Defendant-Petitioner*.	:	**CRIMINAL ACTIONS** ON PETITIONS FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS. A-0891-18T4 and A-00185-17T4 *Sat Below*: JUDGES CLARKSON S. FISHER, JR., P.J.A.D., ROBERT J. GILSON, J.A.D. AND SCOTT J. MOYNIHAN, J.A.D. and JUDGES ROBERT J. GILSON, J.A.D. AND ARNOLD L. NATALI, JR.

BRIEF OF *AMICI CURIAE* 66 BLACK MINISTERS AND OTHER CLERGY MEMBERS WHO HAVE PROVIDED PASTORAL SERVICES TO VICTIMS OF RACIAL PROFILING

Alexander Shalom (021162004)
Jeanne LoCicero (024052000)
Karen Thompson (313662019)
American Civil Liberties Union
of New Jersey Foundation
Post Office Box 32159
570 Broad Street, 11th Floor
Newark, New Jersey 07102
973-854-1714
ashalom@aclu-nj.org

Counsel for amici curiae

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Preliminary Statement

Amici seek to participate in this case to convey the tremendous damage caused by racial profiling, or the use of generalized, race-based descriptions as a basis for conducting traffic stops. Courts typically learn about racial profiling allegations in the context of motions to suppress—*i.e.* where police action using race as a proxy for suspicion actually yielded evidence of criminal behavior. Clergy, who provide comfort and counsel to members of their faith communities whenever they are targeted by police, learn of these allegations and their ramifications upon the lives of their congregants much sooner, much more often, and, usually, where no evidence of criminal behavior exists.

As the clergy who comprise the *amici* here are well-aware, racial profiling does not simply hurt individuals – it injures entire communities. Accordingly, *amici* submit this brief to explain the prevalence of racial profiling and to convey the substantial humiliation and trauma caused by the practice, even where, as is usually the case, no arrest occurs. (Point I). Indeed, good reasons exist for why people—particularly Black people—try to limit their response to police action like shining a flash light into a car. A deep-seated and historically rooted fear of police violence evinces a reasonable instinct to "freeze." That well-founded fear, and any reactions stemming from it, cannot constitute reasonable suspicion. (Point II).

Even if the use of vague race and gender-based descriptions—like the one at the center of this case—provided a meaningful limitation on law enforcement's discretion to conduct traffic stops, criminal justice stakeholders would still be forced to determine whether any marginal public safety benefits flowing from reliance on those descriptions are worth the countervailing harms to public safety and individual dignity caused by them. In truth, these descriptions do so little to limit police action that they effectively authorize the stops of hundreds of thousands of New Jerseyans without check or limit. The Constitution forbids such a broad and porous search and seizure authority. (Point III).

In response to these assertions, the State will undoubtedly explain that the officers in the case did not rely *exclusively* on the vague race-based descriptions of the perpetrators, but also looked to a car's proximity to the crime scene or the car occupants' failure to respond to the officer's spotlight. But none of these facts, considered alone or in combination with the virtually meaningless suspect description, constitutes reasonable suspicion. (Point IV). If a description is so vague it automatically includes thousands of people or if a person is far enough away, in time or distance, from a crime scene that dozens, or hundreds, of people may be included within the parameters of the search, insufficient information exists to justify it and courts should use this framework in analyzing reasonableness. (Point IV, A).

In the instant case, police justified the stop based on what they deemed to be an inadequate reaction by the occupants of the car to an officer shining a light into it. If visible reaction (or, in fact, lack of visible reaction) gives rise to reasonable suspicion, virtually anything a person does can be used to justify a vehicle stop and courts should treat such rationales with extreme skepticism. (Point IV, B).

With that in mind, and to prevent abusive police behavior, the Court should impose limitations for police stops in New Jersey and bar police officers from conducting stops where the only, or predominant, basis justifying the stop is a match to the race and gender of the suspects. Although there would be significant value to such a rule, it would not break new ground: police already know that a tip informing them of a suspect driving a red car would not allow them to consequently stop what could arguably be tens of thousands of red cars on New Jersey's roads. Similarly, suspect descriptions merely identifying race and gender do not provide the reasonable, articulable suspicion the Constitution requires. There is deep value in this court explicitly saying so. (Point V).

Statement of Interest of *Amici*

Amici are 66 ministers and leaders of other faiths, including rabbis and imams, who have personally witnessed the harms associated with racial profiling.[1] Although the clergy members provide pastoral services in all parts of New Jersey, with congregations in 15 counties, these clergy share a common thread: members of their communities have been stopped by police solely because they were Black.

Amici have seen firsthand, and provided counsel and guidance following the trauma individuals close to them have suffered as a result of these stops, even when the stops only last for a few minutes and do not result in arrests.

Amici join this brief to urge the Court to take bold action to end the scourge of racial profiling that has caused significant harm to the people to whom *amici* provide spiritual counsel.

[1] A complete list of the clergy people who have joined this brief is attached hereto as Appendix A.

Statement of Facts and Procedural History

Amici accept the facts and procedural history contained in Defendant-Petitioner Myers' Petition for Certification, but highlight the following facts pertaining to the car stop at issue:

On May 7, 2011 just after midnight, Officer Mark Horan of the Hamilton Police Department heard over dispatch that a robbery had occurred at a 7-11 and the suspects, "two black males," had fled on foot. 2T 4:15-22; 3T 40:3; 7:13-15.[2] When Officer Horan received the call, he was near the city line (2T 5:7-8) and there was light traffic on the road between him and the store. 3T 31:6-14.

Officer Horan shined a handheld spotlight on cars that were traveling toward him, looking into each of the cars for a second or two. 3T 12:20-22. The first car he shined the light into contained a man and a woman who responded in "either [an] alarmed or annoyed" manner. 2T 9:10-24. The officer did not stop that car. When he shined his light into the second car, he saw three Black males inside. 2T

[2] Defendants use different transcript notations in their briefs, *amici* use the following abbreviations:

2T – May 14, 2013 Hearing on Motion to Suppress
3T – May 15, 2013 Hearing on Motion to Suppress
4T – August 7, 2013 Hearing on Motion to Suppress
5T – September 16, 2013 Ruling on Motion to Suppress
6T – September 6, 2018 Nyema's Sentencing
9T – November 29, 2016 Myers' Plea

8:12. None of the men responded to the light or made eye contact with Officer Horan; this behavior "struck [him] as odd." 2T 11:8-17. Although dispatch had advised him that only two Black males had committed the robbery and that they had left the scene left on foot, Officer Horan thought that the third man could be a getaway driver, even though he had never personally handled a robbery in which a getaway driver was involved. 2T 12:8-16. In light of these facts, Officer Horan made a U-turn, activated his lights, and stopped the car. 2T 12:18-13:7. Two other officers in two other cars arrived as Officer Horan stopped the car. 2T 15:7-18. All three officers approached the car with their weapons drawn. 2T 15:7-17:15. At the suppression hearing, Ajene Drew was identified as the driver, Peter Nyema was identified as the front-seat passenger, and Jamar Myers was identified as the rear-seat passenger. 2T 17:9-20:3.

The trial court denied the defense motion to suppress as to some of the evidence retrieved, but granted the motion as to other evidence. 5T 7:13-8:13. On November 29, 2016, Mr. Myers entered a conditional guilty plea. 9T 14:16-22. On October 4, 2017, in the midst of trial, Mr. Nyema entered a guilty plea. 6T 6:12-19. Both defendants appealed their convictions, challenging the validity of the car stop. The Appellate Division affirmed as to Mr. Myers, *State v. Myers*, No. A-0185-17T4, 2019 WL 1581430 (App. Div. Apr. 12, 2019), and reversed as to Mr. Nyema. *State v. Nyema*, 465 N.J. Super. 181, 193 (App. Div. 2020). The Court

granted the Petition for Certification filed by the State, *State v. Nyema*, No. 085146, 2021 WL 568510, at *1 (N.J. Feb. 12, 2021). And, after reconsideration, the Court granted Mr. Myers' Petition, "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." *State v. Myers*, No. 082858, 2021 WL 568419, at *1 (N.J. Feb. 12, 2021).

Argument

I. Race-based stops cause tremendous harm.

A person need not be subjected to actual violence to benefit from the Constitution's prohibition on unreasonable searches or seizures; limitations on a person's freedom of movement or the risk of physical violence are sufficient to trigger the protections of Article I, Paragraph 7. "The right of freedom of movement without unreasonable interference by government officials is not a matter for debate at this point in our constitutional development." *State v. Shaw*, 213 N.J. 398, 421 (2012). Indeed, "'[t]he rights of the public to be free from the unwarranted use of power by law-enforcement officials would be in a sorry state if evidence obtained in violation of a citizen's constitutional rights were admissible merely because the citizen had not been subjected to physical abuse." *Id.* (*citing State v. Chippero*, 164 N.J. 342, 358 (2000) (*quoting State v. Johnson*, 118 N.J. 639, 659 (1990))). Put differently, people are profoundly harmed by racial profiling, even when it does not result in physical violence, or even prolonged

arrests. *Amici* have seen firsthand the trauma caused by racial profiling and social science only confirms the experiences shared with them. Those who minimize the damage caused by racial profiling and seek to write off those harms as marginal increase the resentment, hurt, and distrust that communities of color feel toward police.

In response to those minimizations, political philosopher Annabelle Lever has provided a succinct explanation of how racial profiling causes harm to Black peoples' psyches:

> Racial profiling publicly links [B]lack people with a tendency to crime. For that reason alone, it is likely to exacerbate the harms of racism. However scrupulous the police, racial profiling is likely to remind [Black people], all too painfully, that odious claims about their innate immorality and criminality justified their subordination in the past, and still resurface from time to time in contemporary public debate.
>
> [Annabelle Lever, *Why Racial Profiling is Hard to Justify: A Response to Risse and Zeckhauser*, 33 Phil. & Pub. Aff. 94, 97 (2005).]

She also explains that although "being stopped and having one's papers examined when shopping, at an airport, or bus station [may only] . . . make one feel hurt, resentful, and distrustful of the police, being stopped on the motorway at night is likely to be a scarier experience." *Id.* at 103. After all,

> Police in the United States carry guns, and are known to use them. By the side of the motorway no one can really tell what is going on. A wrong move, the inability to hear or understand what is being said, a fit of coughing or a panic attack can all lead to violence and tragedy. Police have been known to mistake a [B]lack man gasping for air, or suffering from a heart attack or epilepsy, for someone trying to resist arrest or to attack them, and have then responded with what turned out to be deadly force . . . .
>
> In short, fear of violence and of death at the hands of the police—not just feelings of hurt, resentment and distrust—are likely to be among the harms of profiling in a racist society, and to occur even when the police officer one is dealing with appears to be polite and considerate.
>
> [*Id.* at 103-04.]

Law professor Randall Kennedy has explained how individual indignities create deep community harms. "[D]angerous, humiliating and sometimes fatal encounter[s] with the police [are] almost a rite of passage for a [B]lack man in the United States." Randall Kennedy, *Race, Crime and the Law*, 161 (1997). These experiences create "powerful feelings of racial grievance against law enforcement authorities." *Id.* at 159. The injuries to single people reverberate throughout entire communities:

> Each of these incidents becomes a story that is shared with others in the family, with others in the same neighborhoods, and with others in the same racial and ethnic groups. This leads to widely held perceptions across these groups that they—all the members of these racial or ethnic groups, not just the few individuals who

> may have engaged in some criminal conduct—are the actual target . . . .
>
> This aggregation of individual damage points to why racial profiling is deeply damaging on a societal level—not just to the communities subjected, but to all citizens, and even to police and their efforts to fight crime and disorder. When whole groups share stories about being targeted by police, this reinforces (or creates anew) the message that police enforcement practices land on people not because of what they do, but because of how they look—that is, the racial or ethnic group to which they belong. By any moral measure, this seems wrong.
>
> [David A. Harris, *Racial Profiling*, 2 Reforming Criminal Justice: Policing 117, 136 (Erik Luna ed., 2017).[3]]

It is this damage—to individuals and communities—that *amici* and members of their community have experienced far too often, and that they seek to prevent in the future.

II. Requiring an aggravation or discomfort response from black motorists in response to a police officer's act during a traffic stop ignores social science establishing a legitimate fear of potential violence by law enforcement.

Officer Horan explained that it stuck him as "odd" when the occupants of the car did not respond to his light. 2T 11:8-17. Far from odd, many people, especially Black people, frequently take steps to avoid interactions with police. Whether people flee or freeze, their motivation is often the same: they do not want

[3] Available at https://law.asu.edu/sites/default/files/pdf/academy_for_justice/5_Reforming-Criminal-Justice_Vol_2_Racial-Profiling.pdf.

to engage with law enforcement. New Jersey courts have long recognized that the discomfort many "city residents" feel around some police "is regrettable but true." *State v. Tucker*, 136 N.J. 158, 169 (1994). In *Tucker*, the Court acknowledged that reality and held that there were reasons other than guilt that might cause "a young man in a contemporary urban setting [to] . . . run at the sight of the police." *Id.* As a result of that recognition, in New Jersey, flight alone cannot constitute reasonable suspicion. *Id.* at 173.

Other courts have more explicitly named the legitimate fear many Black people have of police. As the Supreme Judicial Court of Massachusetts explained in 2016:

> the finding that [B]lack males in Boston are disproportionately and repeatedly targeted for [investigatory stops] suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.
>
> [*Com. v. Warren*, 475 Mass. 530, 540 (2016).]

The logic applies with equal force to people who try not to respond when they encounter a police officer. A recent dissent from an intermediate appellate court in California perfectly explains why courts should not treat a non-response to police action as sufficiently suspicious to warrant a stop and deserves a lengthy citation here:

The court found it ‘odd’ and therefore suspicious that appellant did not move or speak when the spotlight came on and did not rise until the officers commanded him to do so. To the trial court, reasonable suspicion was created because appellant bent over and, unlike ‘any normal human being,’ waited ‘too long’ (an amorphous concept not quantified by the witness or the court) to stand erect and remained silent

[. . . .]

Under the trial court’s ruling and the majority opinion, however, how does one avoid police contact without creating reasonable suspicion justifying detention?

[. . .]

The majority’s approach that appellant froze and waited ‘too long’ to rise will apply to a wide array of conduct that cannot provide an objective basis for reasonable suspicion. Appellant’s reaction was neither abnormal nor suspicious. Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.) To hold otherwise ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them.

Even outside of communities distrustful of police authority, how safe is it anytime or anywhere to move suddenly when police approach? Movement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot. On top of that, we know for some populations, to stand up from a bent position as the police approach would effectively be suicidal, as it would likely be interpreted as a threatening act. To find freezing and waiting ‘too long’ reasonably suspicious is irresponsible and dangerous to both law enforcement and those with whom it interacts.

> The majority says you can't duck and freeze and then wait too long to stand up. What's left? The only option for a 'normal' human being, according to the majority, is to immediately stand erect and politely inquire about the purpose of the stop, a conversation we all have an absolute right not to start . . . . The majority opinion narrows the options for those who want to be judged 'normal' and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.
>
> [*People v. Flores*, 60 Cal. App. 5th 978, 275 Cal. Rptr. 3d 233, 243–44 (2021) (Stratton, J, dissenting), review filed (Mar. 19, 2021).]

While it should suffice to recognize, as Judge Stratton did, that both historical and contemporary realities[4] distort interactions of Black people with the police, any judicial recognition of this particularly fraught reality for many Black Americans finds extensive support in social science. Put simply and frankly:

[4] Much has been written on this subject. From the historical roots of modern policing in slave patrols, Jill Lepore, *The Invention of the Police*, The New Yorker, (July 13, 2020) (linking the rise of modern policing to the enforcement of slave codes), to the targeted enforcement of laws against Black people at the turn of the twentieth century, *see generally*, Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (2010) (discussing racialize policing in the late nineteenth and early twentieth century), to the more recent recognition of racial profiling here in New Jersey, *State v. Soto*, 324 N.J. Super. 66 (App. Div. 1999), it is no longer reasonably in dispute that the enforcement of laws in the United States has not fallen equally on all Americans. Indeed, racialized policing is hardly a relic of the past. *See, e.g.*, American Civil Liberties Union, *A Tale of Two Countries Racially Targeted Arrests in the Era of Marijuana Reform* (2020), available at https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform (documenting significant disparities across the country and in New Jersey in arrests for marijuana possession between Black people and white people, despite similar usage rates).

"[b]eyond avoiding the indignity of racism, our study reveals that running from police may also be motivated by a legitimate fear of death and a desire to avoid it." Jocelyn R. Smith Lee & Michael A. Robinson *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. of Black Psych. 143, 173 (2019). Although "hypervigilance [from Black people afraid of the police] was predominantly expressed as running from police" *id.* at 172, "freezing" can also be a similar but inverse response.[5] Regardless, race-specific trauma reactions should not be judged as criminality and most certainly should not be allowed to serve as a substitute for reasonable suspicion.

III. Race-based stops are unreasonable because they fail to meaningfully limit the number of people subject to them.

Not all stops relying on suspect descriptions including race can be considered "race-based stops" or racial profiling; indeed, "[t]he use of a person's racial or ethnic appearance as part of a reasonably detailed description of a known suspect does not constitute racial profiling . . . [r]ather, it constitutes good police work and may assist in the apprehension of the right person." David A. Harris,

[5] Indeed, in far too many instances, the police command of "freeze!" is followed within mere seconds with gunshots. Accordingly, stillness within seconds of interactions may be an effort to avoid triggering what is often perceived as a justified fear in a police officer that could result in an almost immediate and fatal response.

Racial Profiling, 2 Reforming Criminal Justice: Policing, at 120. Very general descriptions, such "a Black man with a baseball cap" or "Black man with a hooded sweatshirt" could "describe a huge percentage young [B]lack men in any neighborhood on almost any given day, and would not allow a police officer to pick out any particular person as suspicious. On the contrary, it would give the officer a license to stop almost every young [B]lack man." *Id.*

Our courts have long-recognized the inefficacy and constitutional insufficiency of vague descriptions. In *Shaw*, the Court condemned a police stop where police stopped a pedestrian where the only feature the pedestrian "shared with the person sought on the warrant to be executed . . . .w[as] that both were [B]lack men." 213 N.J. at 420. Similarly, in *State v. Love*, the Appellate Division applied the exclusionary rule after police stopped a man who "fit some but not all particulars of the general description given of [a] person or persons who committed purse snatchings in a busy large section of Atlantic City three or four months earlier." 338 N.J. Super. 504, 508 (App. Div. 2001). In that case, "the description of the perpetrator given by the various witnesses was of a thin black male wearing dark clothing ranging in height from five foot eight inches to six feet and in age from twenty to forty." *Id.* at 505. Although, the defendant, a skinny 36 year old, arguably fit the description "it can be safely said that countless others matched the same descriptions." *Id.* at 508. These "fishing expedition" stops violate the

Constitution because they make every black man a potential suspect, and provide police with almost unlimited, albeit unwarranted, license to detain. *Shaw*, 213 N.J. at 420. As Professor LaFave has explained, "[q]uite obviously, the more the description provided . . . can be said to be particularized, in the sense that it could apply to only a few persons in the relevant universe, the better the chance of having at least sufficient grounds to make a stop." 4 Wayne R. LaFave, *Search and Seizure* § 9.4(g), at 198 (3d ed. 1996). Using that logic, courts have invalidated searches that relied upon descriptions so vague they "could have fit many if not most young [B]lack men." *In re T.L.L.*, 729 A.2d 334, 340 (D.C. 1999).

As a guide, *United States v. Brown*, contrasts permissible, helpfully detailed descriptions, providing reasonable suspicion, with vague and inaccurate descriptions that do not. 448 F.3d 239, 247 (3d Cir. 2006). In *Brown*, officers heard a broadcast identifying "the suspects as African–American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd Street, where one male was 5'8" and the other was 6'." *Id.* In that case, like here, the match of the defendants "to even this most general of descriptions was hardly close." *Id.* There, the suspect bulletin described suspects between 15 and 20 years of age, but the people arrested were 28 and 31 years old, respectively. *Id.* Indeed, "about the only thing [the people arrested] had in common with the suspects was

that they were Black . . . By no logic does it, by itself, support reasonable suspicion."[6] *Id.*

To serve as a constitutionally sufficient justification for a stop, a description, whether it contains information about race or not, must include "enough other detail that would allow law enforcement to distinguish people of the same racial or ethnic group from each other." *Id.*

IV. The other factors in this case—proximity to the crime scene and a (non)reaction to the spotlight—fail to create reasonable, articulable suspicion.

If the imprecise description provided in this case cannot provide a basis for the stop in this case, the Court must still determine whether the other bases for the stop render it constitutionally permissible. They do not.

A. Although proximity to the crime scene may be considered, the stop in this case was not so close in time or location to the crime scene to create reasonable suspicion.

It is both axiomatic and a matter of common sense that "[c]ritical to the resolution of the existence of a reasonable and articulable suspicion is the proximity of the stop in time and place to the crime in question." *State v. Gavazzi*,

[6] The already vague "bulletins" or broadcast identifications used by police in stops like the ones at issue here may be rendered even more unreliable where eyewitnesses are involved. Memory does not work like a video recording, but is "far more complex . . . [and] a constructive, dynamic, and selective process. *State v. Henderson*, 208 N.J. 208, 245 (2011). Indeed, eyewitness identifications are incorrect a third of the time. *See Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

332 N.J. Super. 348, 357 (Law Div. 2000). According to Officer Horan, when he learned about the robbery, he was "on Broad Street maybe a few blocks east of the city line so around Cedar Lane maybe." 2T 5:7-8. Based on the route the officer drove, he was just under three miles from the store when he got the call.[7] He estimated that he encountered the car approximately three-quarters of a mile from the store. 2T 7:19-21. The record does not reveal how long it took before police officers received a call about the robbery nor how long it took officers to distribute the suspects' descriptions over police radio. After that occurred, Officer Horan had to travel more than two miles. So, suffice it to say, Officer Horan did not stop the car *immediately* after the robbery nor was he in the immediate vicinity of the scene of the robbery when the stop occurred.

There are several features of this case that distinguish it from the cases where New Jersey courts have determined that proximity to a crime scene—both in time and space—can create reasonable articulable suspicion. In *State v. Reynolds*, a police officer observed only the defendant leaving a field in the area of the crime; the defendant matched a general description of the perpetrator. 124 N.J. 559, 563, 569 (1991). In contrast to that defendant's presence in a deserted, rural area, the defendants in this case were stopped stop less than a mile from a busy highway

[7] *Amici* arrive at this estimate through use of commonly available mapping software such as Google Maps. *See* N.J.R.E. 201(b) (court may take judicial notice of facts not reasonably in dispute).

interchange and near stores (like the 7-11) and restaurants that are open late at night.[8] Whereas in *Reynolds* "[t]he trial court found that defendant's proximity to the crime in both time and space and that his similarity to the general description of the suspect were sufficient to generate a reasonable suspicion . . ." (*id.* at 569), such was clearly not the case here, either in description or proximity.

In *State v. Anderson*, police had a description similarly vague to the one in this case—merely identifying the race and gender of the suspects. However, police pulled the car over mere minutes after the robbery, a few blocks away from the crime scene, and the suspects' car was the only non-police car on the road. 198 N.J. Super. 340, 347 (App. Div. 1985). Similarly, in *State v. Todd*, police officers saw a man who matched a vague build and clothing description of a burglary suspect. 355 N.J. Super. 132, 138 (App. Div. 2002). The Appellate Division found that reasonable suspicion had been established to support the stop of a suspect who was found on a street just a few blocks from the crime scene a few minutes after the crime had been committed. *Id.* Critically, the defendant "was the only person then walking on that street, at approximately 3:30 a.m." *Id.*

Although the description of the suspect in *State v. Gavazzi*, was more robust than here, the officer was unable to verify some aspects of the description. 332 N.J.

[8] Here, too, *amici* rely on Google Maps for facts that should not be in reasonable dispute and asks the Court to take notice of these facts.

Super. at 360. Several factors, however, differentiate *Gavazzi* from this case. There, the suspect was arrested six minutes after the crime within three blocks from the scene. *Id.* Also, the car was the *only* one encountered by officers that night, in a rural or residential area. *Id.* at 352, 360. Although *Gavazzi* is easily distinguished based on the closer proximity and the absence of other cars in the area, it is also worth noting that the trial court there determined that "[t]he initial stop of defendant's vehicle was minimally intrusive." *Id.* at 363. That conclusion requires courts to ignore the harms that flow from racial profiling (*see*, *supra*, Point I) and the *very* intrusive way that the stop was effectuated in this case, with officers approaching the car with their guns drawn and ordering all occupants to place their hands on the roof. 2T 17:13-19.

In short, although proximity in time and place to a crime scene can create reasonable suspicion, it only does so when the act of being close to the scene is specific enough to raise suspicion.

B. Defendants' behavior did not create reasonable suspicion.

Officer Horan explained that while driving toward the crime scene, he shined a light into oncoming cars. (3T 12-20 to 22). The occupants of the first car he shined the light into responded in "either [an] alarmed or annoyed" manner. (2T 9-10 to 24). The officer did not stop that car. When he shined his light into the second car, none of the occupants responded to the light or made eye contact with

the officer; this behavior "struck [him] as odd." (2T 11-8 to 17). Although the occupants of neither car exactly matched the description of the suspects (the first contained a man and a woman (2T 9-10 to 24) and the second contained three men (2T 8-12)) the officer stopped the second car but not the first. A constitutional rule that allows the stop of a car where people do not respond but does not allow the stop of a car whose occupants express alarm or annoyance fails to meaningfully limit police behavior.

On the most basic level, Officer Horan identified a suspicion; but that articulated suspicion cannot qualify as reasonable. After all, would the converse reaction also be "odd" enough to justify a stop? That is, does an expression of annoyance or alarm contribute to reasonable suspicion? Officers' experience, of course, is relevant to their decision making, (*see Terry v. Ohio*, 392 U.S. 1, 27 (1968)) but when that experience, and their categorization of what is suspicious has a "chameleon-like way of adapting to any particular set of observations . . . ." *United States v. Sokolow*, 490 U.S. 1, 13–14 (1989) (Marshall, J., dissenting) (*quoting United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)), it ceases to provide a limitation on police behavior and rather becomes carte blanche to stop. The Constitution forbids such a result.

As Justice Marshall illustrated in dissent in *Sokolow*, courts utilized a series of behaviors *and their converse* to justify stops. *Id.* In that dissent, Justice Marshall

catalogs these justifications by citing cases: (1) finding reasonable suspicion because suspect was first to deplane, where the suspect was the last to deplane, and where the suspect deplaned from middle; (2) where suspicion was based on the purchase of one-way tickets and where the suspect bought round-trip tickets; (3) where suspicion derived from the booking of a nonstop flight and where the suspect changed planes; (4) where courts found suspicion because the suspect traveled with no luggage, where the suspect had a gym bag, and where the suspect traveled with new suitcases; (5) where reasonable suspicion was based on the suspect traveling alone and where the suspect traveled with companion; and, similar to the facts in the instant case, (6) where officers grew suspicious because the suspect acted nervously and another where the suspect acted too calmly). *Id*. (citations omitted).

V. The Court should create a prophylactic rule preventing police officers from effectuating stops where the only or predominant basis justifying the stop is that the people stopped match the race and gender of the suspects.

This Court has a "common law supervisory power over criminal practice within our jurisdiction." *State v. Long*, 119 N.J. 439, 518 (1990). "[W]hen we perceive, as we do here, that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act." *State v. Kuchera*, 198 N.J. 482, 500 (2009) (*quoting State v. Romero*, 191 N.J. 59, 74-75 (2007)). The Court has not hesitated to use its

supervisory power to mandate that law enforcement take or not take particular actions. *See, e.g.*, *State v. Lazo*, 209 N.J. 9 (2012) (invoking supervisory power to regulate police officers' administration of photo identification procedure); *Henderson*, 208 N.J. at 270-71 (invoking supervisory power to require that police officers ask identification witnesses whether the witness has spoken with anyone about the identification and what was discussed); *State v. Delgado*, 188 N.J. 48, 63 (2006) (invoking supervisory power to require law enforcement officers to make a written record detailing the out-of-court identification procedure as a condition to the admissibility of an out-of-court identification). In *State v. Carty*, the Court imposed limitations on police authority to conduct certain searches under the State Constitution. 170 N.J. 632, *modified*, 174 N.J. 351 (2002). In his concurrence to the judgment, Justice Stein urged the Court to "impose precisely the same condition" not under the State Constitution, but as "*a prophylactic rule of law adopted by this Court for the purpose of preventing abuses of the power of law enforcement officers*." 170 N.J. 655-56 (Stein, J., concurring). (emphasis added).

It may be of use to look outside the legal sphere for guidance to this point. Media and educational organizations have recognized that ambiguous racial descriptions not only fail to inform the public, but cause community harms. For example, News5 Cleveland has an explicit policy forbidding the publishing of descriptions that fail to sufficiently describe suspects. As the network explained:

> On the News 5 website we publish specific descriptions, with identifying details, when alerting the public to potential danger, when helping to locate a missing person and when police ask for the public's help in the apprehension of an individual.
>
> If a description is vague, and it could literally describe thousands or millions of people, we don't share it.
>
> In other words: Race and gender alone are not enough.
>
> [Joe Donatelli, *When we include suspect descriptions in our reporting, and when we don't*, News 5 Cleveland (June 23, 2020), https://www.news5cleveland.com/about-us/news-literacy/when-we-include-suspect-descriptions-in-our-reporting-and-when-we-dont.]

For that network, deciding whether to publish a description relies on the potential harm involved. When measured against the marginal value to public safety that could flow from distributing those uninformative descriptions, the network determined that "sharing vague descriptions that are of little value repeatedly to a mass audience does more harm than good." *Id. Accord* Therese Bottomly, *Why not include race in descriptions of suspects?*, The Oregonian (Mar. 27, 2019).[9]

Similarly, some colleges and universities have begun to recognize the limited utility of vague racial descriptions and the countervailing harms created by their distribution. The University of Minnesota, for example, discontinued the use

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9 https://www.oregonlive.com/oregonianeditors/2007/06/why_not_include_race_in_descri.html.

of race in crime alert bulletins "when there is 'insufficient detail to reasonably aid in identifying a suspect.' FOX 9 Minneapolis-St. Paul, *University of Minnesota removes race description from vague crime alerts* (Feb. 25, 2015).[10]

How, then, can courts respond knowing that the use of vague racial descriptions do not promote public safety but cause significant harm? Although the law is clear that a description that contains race and gender and nothing more cannot justify a stop, (*see*, Point III, *supra*), in reality, this has not and cannot substantially alter police behavior and thus will not significantly diminish the harms caused by racial profiling. Bold interventions are thus warranted here.

Professor David Harris explained the problems with rules that prohibit the use of particular things as the "sole" or "only" justification for a stop:

> No action a police officer takes—neither a traffic stop nor a pedestrian stop, for example— happens because of just one factor. Many factors might come into play in any explanation of an officer's behavior: the event having taken place in darkness, presence in a high-crime area, the subject's dress, or the number of subjects present, for example. Therefore, using a definition that includes this "solely" approach effectively defines the problem out of existence.
>
> [David A. Harris, *Racial Profiling*, 2 Reforming Criminal Justice: Policing, at 119.]

[10] https://www.fox9.com/news/university-of-minnesota-removes-race-description-from-vague-crime-alerts.

The Court has already created rules under the State Constitution or under its supervisory authority to ensure that law enforcement officers do not take actions that cause significant harms without corresponding benefits. It should do so here as well by making clear that a description containing only race, gender, or other extremely common features, without more, cannot contribute to a finding of reasonable, articulable suspicion required for a stop. That is, not only do vague racial descriptions fail to justify stops on their own: but they provide so little value that they cannot convert an otherwise impermissible stop into a permissible one.

The elephant in the room, is, of course, that here, the officers got it right: Myers and Nyema are not blameless victims, but participants in the robbery. This is why these cases have reached this Court; they constitute two of a small handful of instances where a police hunch happens to generate evidence of a crime. But "an officer's hunch or subjective good faith—even if correct in the end—cannot justify an investigatory stop or detention." *Shaw*, 213 N.J. at 411 (*citing State v. Arthur*, 149 N.J. 1, 8 (1997)). More importantly, an officer's hunch cannot justify the experiences of the nameless others who have done nothing other than drive their cars on New Jersey's roadways, only to end up seeking comfort and counsel from *amici* for the trauma unjustified stops by police have forced them, inexcusably, to endure.

Conclusion

The behavior of the officers here, and of the so many others for whom this behavior goes unnamed, relies on vague racial descriptions to justify searches, thus creating tremendous harm to people and communities all over New Jersey. *Amici* urge the Court to find that stops based on vague descriptions, like the one articulated in these cases, violate the Constitution. Moreover, *amici* seek an explicit holding from the Court finding that vague racial descriptions cannot convert otherwise impermissible searches into lawful ones.

Respectfully submitted,

Alexander Shalom (021162004)
Jeanne LoCicero
Karen Thompson
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, NJ 07102
973-854-1714
ashalom@aclu-nj.org
Counsel for amici curiae

Appendix A

The following clergy people have signed onto this brief. All of them have agreed to this statement: "We are clergy members from different faith traditions from all corners of New Jersey. All of us have provided pastoral services to members of our community who have been stopped by police because they are Black. We have seen firsthand the trauma that our parishioners have suffered as a result of these stops, even when they only last for a few minutes and do not result in arrests." *The names of houses of worship are provided for identification purposes only*.

1. Rabbi Joel N. Abraham, Temple Sholom, Scotch Plains;
2. Associate Minister Dr. Betty Livingston Adams, Fountain Baptist Church, Summit;
3. Reverend Annie Allen, Rutherford Congregationalist Church, Rutherford;
4. Reverend, Dr. Sammy Arroyo, First United Methodist Church of Hightstown, Hightstown;
5. Pastor Dr. Eric Billups, North Stelton AME Church, Piscataway;
6. Pastor Dr. Myra Billups, North Stelton AME Church, Piscataway;
7. Reverend Emilie Boggis, Beacon Unitarian Universalist Congregation, Summit;
8. Reverend Dr. Charles Boyer, Bethel AME Church, Woodbury;
9. Pastor George Britt, Mt. Teman AME Church, Elizabeth;
10. Imam & President Mohammad Ali Chaudry, Islamic Society of Basking Ridge, Basking Ridge;
11. Pastor Michael Chism, Mt. Zion AME Church, Lawnside;
12. Pastor Dr. James Coaxum, St. James AME Church, Atlantic City;
13. Reverend Julian Cooper, North Stelton AME Church, Piscataway;
14. Reverend Dave Delaney, St. Paul's United Methodist Church, West Deptford;
15. Pastor Dr. Lesly Devereaux, Trinity AME Church, Long Branch;

16. Reverend Dr. LL DuBreuil, Willow Grove Presbyterian Church, Scotch Plains;

17. Doctor Mary Early-Zald, PhD, MDiv, Beacon Unitarian Universalist Congregation, Summit;

18. Reverend Dr. Michael Granzen, Second Presbyterian Church, Elizabeth;

19. Pastor Rupert A. Hall, Turning Point United Methodist Church, Trenton;

20. Pastor Denison D. Harrield, Jr., Wallace Chapel A.M.E. Zion Church, Summit;

21. Pastor Dr. Leslie Harrison, Mt. Zion AME Church, Riverton;

22. Pastor Stanley Hearst II, Mt. Pishah AME Church, Jersey City;

23. Reverend Chris Hedges, Second Presbyterian Church of Elizabeth, Elizabeth;

24. Reverend Dr. Deborah Huggins, Central Presbyterian Church, Summit;

25. Pastor Jamal T. Johnson, Zion Baptist Church, Jersey City;

26. Reverend Seth Kaper-Dale, The Reformed Church of Highland Park, Highland Park;

27. Reverend Erich Kussman, Saint Bartholomew Lutheran Church, Trenton;

28. Reverend Sara Lilja, ELCA Lutheran, Hamilton Square;

29. Acting Executive Director, Charles Loflin, UU FaithAction NJ, Summit;

30. Pastor Faith E. Mack, Greater Mt. Zion AME Church, Trenton;

31. Reverend Bryan McAllister, Heard AME Church, Roselle;

32. Pastor Reverend Anthony Mitchell, Union Chapel, Newark;

33. Pastor Natalie Mitchem, Quinn Chapel, Atlantic Highlands;

34. Reverend Lukata Agyei Mjumbe, Witherspoon Street Presbyterian Church, Princeton;

35. Pastor Jameel Morrison, Grant AME Church, Chesilhurst;

36. Reverend Naomi Myers, Heard AME Church, Roselle;

37. Pastor Richard Norris II, Bethel Hosanna AME Church, Pennsauken;

38. Reverend, Dr. Ronald L. Owens, New Hope Baptist Church, Metuchen;

39. Pastor Mark E. Parrott, Lighthouse Temple Church, Newark;

40. Pastor Mark E. Parrott, Sr., Lighthouse Temple Church, Newark;

41. Reverend Candido Perez, Iglesia de Dios Pentecostal la Gloria del Altisimo, Union City;

42. Deacon Kathryn Prinz, ELCA, Morristown;

43. Reverend Ann C. Ralosky, First Congregational Church, Montclair;

44. Reverend Dr. Terry Richardson, First Baptist Church, South Orange;

45. Pastor Marti Robinsin, Ebenezer AME Church, Rahway;

46. Reverend John Rogers, First Congregational Church of Montclair, Montclair;

47. Reverend Louise Scott-Rountree, Good Neighbor Baptist Church, Newark;

48. Bishop Fred Rubin, Community Refuge Church of Christ, Manalapan;

49. Pastor Cassius Rudolph, Saints Memorial Baptist Church, Willingboro;

50. Reverend Chuck Rush, Christ Church, Summit;

51. Reverend Teresa Rushdan, St. Matthew AME Church, Orange;

52. Reverend Blake Scalet, Saint John's Lutheran Church, Summit;

53. Reverend Ron Sparks, Bethel AME Church, Freehold;

54. Bishop Gus Swain, Jr., New Life Church Ministries, Pennsauken;

55. Reverend Preston E Thompson, Ebenezer Baptist Church, Englewood;

56. Rabbi David Vaisberg, Temple B'nai Abraham, Livingston;

57. Pastor Gloria Walker, Bethel AME Church, Camden;

58. Pastor Cassandra Renee White, Mt. Laurel AME Church, Pilesgrove;

59. Mother Reverend Diana L. Wilcox, Christ Episcopal Church in Bloomfield & Glen Ridge, Bloomfield and Glen Ridge;

60. Pastor Charles Wilkins, Grant Chapel AME Church, Trenton;

61. Pastor Douglas Wilkins, Bethel AME Church, Patterson;

62. Reverend Vernon Williams, Fountain Baptist Church, Summit;

63. Pastor Reverend Melvin Wilson, St. Matthew AME Church, Orange;

64. Reverend Barry Wise, Greater Mt. Moriah Baptist Church, Linden;

65. Emma Worrall, MDiv. Student, United Methodist Church, Denville; and

66. Reverend Julie Yarborough, Christ Church, Summit.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 085146

STATE OF NEW JERSEY, Plaintiff-Appellant, V. PETER NYEMA, a/k/a PETE DINAH, KAREEM T. JEFFRIES, HNE NYEMA AND PETE NYME, Defendant-Respondent.	CRIMINAL ACTION ON CERTIFICATION FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-0891-18T4 SAT BELOW: Hon. Clarkson S. Fisher, P.J.A.D. Hon. Robert J. Gilson, J.A.D. Hon. Scott J. Moynihan, J.A.D.

BRIEF OF AMICI CURIAE THE LATINO LEADERSHIP ALLIANCE OF NEW JERSEY AND NATIONAL COALITION OF LATINO OFFICERS

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street, Suite 200
Hackensack, NJ 07601
Ph: (201) 488-8200
F: (201) 488-5556
cgriffin@pashmanstein.com

Attorneys for Amici Curiae, Latino Leadership Alliance and National Coalition of Latino Officers

On the Brief:

CJ Griffin (03142209)
Darcy Baboulis-Gyscek (269542018)

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STATEMENT OF INTEREST OF AMICI CURIAE

The Civil Rights Protection Project ("CRPP") of the Latino Leadership Alliance of New Jersey ("LLANJ") was founded in 1999 and is the major Latino advocacy organization in New Jersey representing most of the Latino organizations across the state. In 2008, LLANJ created the CRPP to monitor New Jersey policing activities, including racial profiling and pretextual stops. Racial profiling and racial disparities in policing and within the criminal justice system has been one central focus of CCRP's work.

LLANJ/CCRP advocated against the termination of the 1999 consent decree concerning the practice of racial profiling by New Jersey State Police because it strongly believed that federal oversight was still needed. LLANJ/CCRP routinely monitors police data to look for racial disparities in traffic enforcement, use of force, and other criminal justice matters. The decision in this case will therefore directly impact LLANJ's core constituency. LLANJ has an interest in protecting Latino motorists from unlawful stops which are insulting, violate their personal liberty, and sometimes put their lives at risk. The special interest and the expertise of the LLANJ in this area of the law are significant and the Court's decision will impact the organization, its members, and the Latino community.

The National Coalition of Latino Officers ("NCLO") is a non-profit organization with its headquarters in New Jersey. It was

founded in 2012 to address the concerns of the many Latino law enforcement organizations and officers throughout the nation. Each of the founding members of NCLO has an extensive background in law enforcement and have all been executive board members of other Latino organizations. Many members are currently law enforcement officers working within New Jersey law enforcement agencies. NCLO believes that together the Latino law enforcement community has a decisive and united voice.

NCLO supports more than twenty Latino law enforcement organizations across the nation, including local chapters in New Jersey. NCLO acts as ambassadors between the community and government. It works with the community and all levels of government to bring fairness and equality to the hiring and promotional practices of law enforcement agencies; to provide adequate and valuable training and education to its members in furtherance of their careers; to be an advocate for its member organizations at the state and national level; and to assist member organizations in community outreach programs. It actively seeks to build better trust between the community and police officers.

NCLO and LLANJ/CCRP (collectively "Amici") file this friend-of-the-court brief in support of affirmance of the Appellate

Division's published decision below in State v. Nyema, 465 N.J. Super. 181, 192 (App. Div. 2020).[1]

PRELIMINARY STATEMENT

In this search and seizure case, the Court is asked to confirm basic constitutional thresholds that must be satisfied before law enforcement may lawfully stop and conduct a warrantless search of a motor vehicle. The trial court erroneously denied a motion to suppress physical evidence obtained following an investigatory stop of a vehicle occupied by three Black men, including Defendant Peter Nyema, based on nothing more than the officer's mere hunch that Defendant and the other occupants were involved in the commission of an armed robbery of a 7-Eleven store.

The evidence adduced at the suppression hearing reflected that a patrol sergeant received a dispatch transmission that two Black men robbed the 7-Eleven on Arena Drive in Hamilton Township, right off a major highway. The transmission said that one of the men possessed a gun and that both men fled on foot after the robbery. After receiving the transmission, the patrol sergeant began driving towards the 7-Eleven store, at which point he passed several vehicles traveling in the opposite direction. Turning

[1] Amici are simultaneously filing a motion for leave to appear as amici curiae in State v. Jamar J. Myers, Supreme Court Docket No. 082858, asking the Court to reverse in that case. It relies upon this brief for both cases.

onto Arena Drive, the sergeant stopped the second car that passed him in the opposite direction, approximately three minutes after the dispatch. Notably, the State never established the actual time at which robbery occurred.

There was nothing peculiar about this vehicle, other than its location less than three-quarters of a mile from the scene of the crime, the fact that the race and gender of its occupants in some respects matched the description in the dispatch, and the mere fact that the men in the car looked straight ahead when the patrol sergeant shined his searchlight into the car. Defendant's activity was virtually indistinguishable from the activity of the occupants of all the other vehicles traveling in that neighborhood at that time, driving from the vicinity of a major highway exit ramp on a frequently used thoroughfare. But the patrol sergeant's rationale suggests that he would have stopped any car that he passed on that road so long as one or more of the vehicle's occupants were Black men and did not respond to his bright spotlight in a way that he found satisfactory.

Those limited facts fall far short of satisfying the State's burden to prove by preponderance of the evidence that this stop was based on specific and articulable facts which, taken together with rational inferences from the facts, give rise to a reasonable, particularized suspicion of criminal activity. An officer's generalized suspicion, hunch, or even his subjective good faith

believe — perhaps driven by implicit biases — that criminal activity may be afoot is inadequate to justify a random investigatory stop of an individual and violates the prohibition against unlawful search and seizure set forth in the Fourth Amendment and Article 1, Paragraph 7 of the New Jersey Constitution. That, however, was precisely the basis for the stop in this case.

Accordingly, the Appellate Division properly reversed the trial court's denial of Defendant Nyema's motion to suppress evidence obtained pursuant to the unlawful stop of the vehicle in which he was a passenger. Any other conclusion would offend our longstanding notions of reasonableness and would authorize stops based solely on race and gender, a notion which is plainly contrary to the Court's jurisprudence. Moreover, if reinstated, the trial court's ruling would set a dangerous precedent in perpetuating racial profiling and would allow officers driven by implicit biases to stop people of color simply because the officer felt their behavior was too cautious, too nervous, or otherwise "odd."

In this regard, it is entirely reasonable for people of color to fear the police because in this state and across the nation, people of color are disproportionately stopped, ticketed, searched, arrested, and subjected to physical force by police officers. Thus, people of color may respond differently than white

people do when they have interactions with the police, but that does not render their behavior as indicative of guilt.

Because none of the facts known to the patrol sergeant justified a reasonable and particularized suspicion that the occupants of the stopped vehicle engaged in criminal activity, this Court should affirm. Any other decision would allow racial profiling to fester and violate the rights those subjected to it.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Amici rely upon the procedural history and statement of facts as set forth in the Appellate Division's published decision below in State v. Nyema, 465 N.J. Super. 181 (App. Div. 2020), with the addition of the following recitation of facts:

According to Sergeant Mark Horan[2] of the Hamilton Township Police Department, he was patrolling alone in his marked police vehicle on Broad Street around Cedar Lane in Hamilton Township on May 7, 2011, when he received a transmission concerning a robbery at a 7-Eleven Store located at 1993 Arena Drive. The 7-Eleven is located right off Highway 195, near an exit ramp. The speed limit on Arena Drive is 40 miles per hour.

Sergeant Horan received the dispatch transmission just after midnight, at 12:12 a.m. The dispatcher reported that two Black

[2] Of the three witnesses who testified at the two-day suppression hearing, Sergeant Horan was the only witness who provided testimony relevant to the issue before the Court.

men wearing dark clothing, one armed with a gun, robbed the 7-Eleven and fled on foot. The dispatcher indicated in the transmission that the robbery "had just occurred." (1T4:21-22).[3] Beyond that generalized statement, however, the State never established the actual time that the robbery occurred.

After receiving the transmission, Sergeant Horan drove toward the 7-Eleven. He approached the intersection of Whitehouse Avenue and Arena Drive, which is "just shy of three-quarters of a mile" from the 7-Eleven. (1T7:20-21). He passed several vehicles when approaching this intersection. Sergeant Horan made the turn from Whitehouse Avenue onto Arena Drive and proceeded towards the 7-Eleven. Once on Arena Drive he slowed down and turned off his flashing lights.

On Arena Drive, Sergeant Horan passed one car traveling in the opposite direction away from the 7-Eleven. He shined his searchlight into the car and saw a man and a woman. He did not recall the race of the occupants of that vehicle, but he did not stop them. (2T13:10-17). Sergeant Horan speculated about their reaction to the searchlight, "You know, I can't say exactly what their interpretation was, but they were, I suppose, either alarmed or annoyed." (1T9:19-21).

[3] Amici rely on the transcript abbreviations used by the parties.

Sergeant Horan then passed a second car traveling away from the 7-Eleven and shined his searchlight into the vehicle. He observed three Black men. He did not observe any dark clothing on the vehicle's occupants, despite the dispatch report that the suspects, fleeing on foot, were wearing dark clothing. (2T15:9-16). Upon shining the searchlight, Sergeant Horan testified, "I received no response from any of [the vehicle's occupants] that I could observe . . . ." (1T10:14-15). The three occupants "were all looking straight ahead, in the direction their vehicle was proceeding[.]" (1T10:23-24). Sergeant Horan made these observations within a second or two, while he was manually directing the searchlight and driving his car at a bend in the road. (2T11:23-12:2; 2T12:20-13:8).

Sergeant Horan considered the lack of reaction to his searchlight by the three Black men in the vehicle to be "odd." (1T11:17). He made a U-turn and stopped the vehicle. (1T12:18-25). There was no evidence introduced regarding Sergeant Horan's exact distance from the 7-Eleven when he first encountered the vehicle. Rather, he guessed that it had to be "somewhat shy of three-quarters of a mile." (1T7:20-21). Sergeant Horan estimated that approximately three minutes lapsed from when he received the dispatch until he pulled the car over. (2T42:2-3).

In sum, Sergeant Horan's testimony regarding his reasons for stopping the car in question was limited to the following:

1) He received a dispatch that a 7-Eleven had been robbed by two Black men who fled on foot;
2) He saw the car approximately three minutes after the dispatch;
3) The car was traveling away from the 7-Eleven on Arena Drive;
4) The car was an unspecified distance from the 7-Eleven, which he approximated was somewhat less than three-quarters of a mile;
5) The car was occupied by three Black men who did not react when he shined his searchlight into the car.

Sergeant Horan attempted to explain why he stopped a car with three Black men when only two were reported to have participated in the robbery. Although he was unable to identify a specific example, Sergeant Horan explained that it is "not uncommon" for there to be a third person to drive the get-away vehicle. (1T12:9-16).

The trial court rendered a preliminary oral decision on August 7, 2013. In a terse oral ruling, the court ruled that "based on the facts, . . . the stop was reasonable, . . . there was a reasonable articulable suspicion to stop the vehicle." (3T57:22-24). The trial court recited the "sex and race of the people involved in this robbery, black males, as per [Sergeant Horan's] advisory"; "the short distance from the point that he observed the vehicle in relation to the 7-Eleven, less than three-quarters of

a mile"; "the short time between the call in and the observation, less than two to three minutes"; and the lack of reaction by the occupants to the searchlight into the vehicle. (3T58:1-19). Notwithstanding the wholesale adoption of these facts in its ruling, the court made no credibility findings concerning Sergeant Horan's testimony.

LEGAL ARGUMENT

I. THE STATE FAILED TO PROVE, BASED ON SPECIFIC AND ARTICULABLE FACTS, THAT POLICE HAD A REASONABLE SUSPICION TO CONDUCT AN INVESTIGATORY STOP OF THE VEHICLE.

The State, relying on the limited and impermissible justifications reflected in Sergeant Horan's testimony, failed to meet its burden to prove the existence of a reasonable suspicion for an investigatory stop of the vehicle occupied by Defendant. Accordingly, the trial court improperly denied Defendant's motion to suppress the physical evidence obtained pursuant to the unlawful stop.

Enshrined in the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of our State Constitution is the "[t]he right of the people to be secure . . . against unreasonable searches and seizures." State v. Chisum, 236 N.J. 530, 544-45 (2019); State v. Shaw, 213 N.J. 398, 409 (2012). These constitutional guarantees protect individuals against the arbitrary invasion of their privacy rights by the police. Chisum, 236 N.J. at 544. In other words, people "are free to go on their

way without interference from government." Id. at 545 (quoting Shaw, 213 N.J. at 409). In view of that fundamental right, police "may not randomly stop and detain people without particularized suspicion." Ibid. (quoting Shaw, 213 N.J. at 409) (emphasis added).

Due to the strong preference for searches to be authorized in advance by judicially sanctioned warrants, a warrantless search is presumed illegal unless it comes within one of the narrowly defined exceptions to the warrant requirement. Chisum, 236 N.J. at 545; State v. Bryant, 227 N.J. 60, 69-70 (2016); State v. Wilson, 178 N.J. 7, 12-13 (2003). The applicable exception to the warrant requirement in this case is the "investigative stop," also known as the "Terry stop." State v. Alessi, 240 N.J. 501, 517-18 (2020) (citing Terry v. Ohio, 392 U.S. 1 (1968)). The State is required to prove that the stop was "based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." Id. at 518. The Court, viewing the totality of the circumstances, must weigh "the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions." Chisum, 236 N.J. at 546. The State's failure to meet its burden will result in suppression of the fruits of the stop. Alessi, 240 N.J. at 518. Crucially, an investigative stop "may not be based on

arbitrary police practices, the officer's subjective good faith, or a mere hunch." Chisum, 236 N.J. at 546.

Against that backdrop, even with the benefit of rational inferences, the proffered justifications for this stop were not specific, articulable, or reasonable. Apart from a few marked exhibits, the State exclusively relied on the testimony of Sergeant Horan at the suppression hearing. State v. Wilson, 178 N.J. 7, 14 (2003)(holding that suppression motions based on warrantless conduct are decided on the "'four corners' of the evidence presented at the suppression hearing").

First, Sergeant Horan's description of the suspects accused of robbing the 7-Eleven based on the dispatch was limited to *two* Black men dressed in dark clothing, one with a gun, both of whom fled the scene *on foot*. No witness reported seeing the men get into a car and the vehicle ultimately stopped by Sergeant Horan had three, not two, occupants. To justify that inconsistency between the description and the vehicle stopped, Sergeant Horan explained that it was not uncommon for people committing a robbery to have a getaway car and driver, without identifying anything specific in his experience that supported that conclusion. He might have equally speculated that it is common for suspects to flee on foot, together or separately, or for there to be no third participant. Thus, Sergeant Horan's generalization as to the purported getaway driver is not a specific fact necessary to

support a reasonable suspicion to sustain the stop; it was merely a hunch.

Second, Sergeant Horan based his alleged suspicion on the vehicle's location with respect to the 7-Eleven. However, the State never established (1) when the robbery actually occurred; or (2) when the robbery was reported to the police. Absent those critical facts, there was no reasonable basis for Sergeant Horan to conclude that the suspects were still within the vicinity of the 7-Eleven. The fact that a vehicle is within some unspecified distance of, but less than three-quarters of a mile from, the scene is irrelevant without facts establishing when the crime occurred.

To demonstrate the flaws in Sergeant Horan's rationale, a car traveling around the posted 40 mile-per-hour speed limit on Arena Drive would be traveling approximately .67 miles per minute. If the robbery took place five minutes before the dispatch transmission, a car leaving the 7-Eleven would have traveled approximately 3.35 miles in five minutes, thereby placing the vehicle far beyond the location Sergeant Horan made the stop. The dispatcher's only qualification as to the time of the robbery was that it "had just occurred." An event that "just" occurred could be construed as meaning one minute ago, five minutes ago, or even ten minutes ago. Equally ambiguous from Sergeant Horan's testimony is whether the dispatcher was simply relaying that the person who

reported the robbery said, it "just occurred." Nor does the record reflect the time at which the report was called in to police.

Thus, Sergeant Horan's hunch regarding the location of the vehicle being three-quarters of a mile from the 7-Eleven is not a specific and articulable fact necessary to satisfy the State's burden to prove, more likely than not, a reasonable suspicion of criminal activity. Because the State failed to meet its burden, this Court, like the Appellate Division, will be forced to speculate as to whether there was a reasonable basis for Sergeant Horan to suspect that the perpetrators were still in the area. Nyema, 465 N.J. Super. at 192 ("Without information on whether the robbery committed was reported five minutes or an hour earlier, the State leaves us to speculate on whether Horan had a reasonable basis to assume the perpetrators were still in the area.").

Third and finally, Sergeant Horan rested his suspicion on the vehicle being occupied by three Black men who did not react when he shined his searchlight into the car.[4] The fact that

[4] It is far from clear whether Sergeant Horan's purported observation could even be credited. He testified that he only saw into the car for a second or two while he was manually controlling the spotlight and driving his car on a part of the road that bends. It would certainly become difficult to observe anything inside a car, let alone the occupant's facial expressions, from the opposite direction while traveling 30-40 miles per hour at night under these circumstances. The trial judge made no credibility findings with respect to Sergeant Horan's testimony, and therefore this Court should accord it no deference. See New Jersey Div. Of Youth and Fam. Servs. v. F.M., 375 N.J. Super. 235, 259-60 (App. Div. 2005)("[T]his record contains virtually no findings based on

occupants of a vehicle do not react when police shine a bright searchlight into their car does not make it more likely those individuals are involved in criminal activity. In fact, it may establish just the opposite. The Court rightly observed in State v. Tucker, 136 N.J. 158, 169 (1994), "[t]hat some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true." That observation is especially true with Black, Latino and other minority communities, who are routinely the subject of racial profiling and unreasonable, arbitrary, or abusive police practices.

Many people of color legitimately fear being harmed by the police and numerous studies show significant racial disparities in every area of policing.[5]

> Minority suspicion of police enforcement is rooted in history. While recent incidents of police brutality toward communities of color have confirmed existing minority suspicions about racially biased law enforcement, these suspicions are not new. The willingness of police to enforce discriminatory laws, such as

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credibility and therefore requires less deference from us than would be otherwise appropriate."); Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000) ("Because there was no testimony by any witness and no credibility findings, the judge's ruling is not entitled to deference.").

[5] For a list of nearly 150 studies that have shown racial bias in policing, see Radley Balko, There's Overwhelming Evidence That The Criminal-Justice System Is Racist. Here's The Proof., Wash. Post, Sept. 18, 2018, available at https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?utm_term=.bb4e9c278943#section2.

> the southern slave codes prior to the Civil War and "Jim Crow" thereafter, the inability or unwillingness of police to protect Blacks from mob violence and lynching, and police precipitation of mob violence against Blacks during the Civil Rights Era, have all contributed to a history of betrayal of minorities by the police force.
>
> [Mia Carpiniello, Striking A Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops, 6 Mich. J. Race & L. 355, 361-62 (2001).]

In fact, many parents of color "educate their children at an early age about the dangers of police officers and how survival depends on staying away from them." Amy Ronner, Fleeing While Black, 32 Colum. Hum. Rts. L. Rev. 383, 396-97 (2001). See also Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk' - instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger - all out of fear of how an officer with a gun will react to them.").

The high-profile shootings of Black people that happen far too often deeply traumatize people of color and the fear of police may cause them to flee the police, to resist the commands of police officers who tell them to exit their vehicles, or to appear nervous or cautious. See Adam B. Wolf, The Adversity of Race and Place: Fourth Amendment Jurisprudence in Illinois v. Wardlow, 528 S. Ct. 673 (2000), 5 Mich. J. Race & L. 711, 717 (2000) (highlighting a

few examples of police brutality, "clearly just a sampling of hundreds of thousands of such instances," to "provide a proper backdrop to show the reasonableness of fear of the police felt by many people of color, and, therefore, their flight response").

> Disparities in the historical relationship between law enforcement and residents of difference races and ethnicities can manifest . . . as different behaviors on the part of citizens interacting with police. Extensive research demonstrates that, compared to White people, Black people are more distrustful and nervous (even scared) when interacting with a police officer . . . To the officer, this nervousness may appear suspicious . . . , and the officer may stop and question the Black person based, in part, on this "suspicious" behavior.
>
> [David Weisburd and Malay K. Majmunda, Proactive Policing: Effects on Crime and Communities, 275 (2018).

See also Anthony J. Ghiotto, Traffic Stop Federalism: Protecting North Carolina Black Drivers from the United States Supreme Court, 48 U. Balt. L. Rev. 323, 351 (2019) ("It is reasonable to expect that the constant scrutiny by police officers would lead to mistrust, fear, and nervousness by those who are consistently followed."); David Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 Ind. L.J. 659, 680 (1994) ("African Americans, as more frequent targets of undesirable treatment by police than whites, are naturally more likely to want to avoid contact with the police.").

Here, the purported lack of reaction to Sergeant Horan's spotlight could likely be the result of three innocent Black men cautiously seeking to avoid an unpleasant and perhaps *dangerous* encounter with police.[6] Sergeant Horan thought it was an "odd" response, but implicit biases can cause police officers "to evaluate ambiguous behaviors as more threatening or suspicious when engaged in by Black individuals versus White individuals." L. Song Richardson, Implicit Bias and Racial Anxiety: Implications for Stops and Frisks, 15 Ohio State J. Crim. L. 75-78 (2017). See also Katherine B. Spencer, et al., Implicit Bias and Policing, 50 Social & Personality Compass 52 (2016)("Implicit biases will most influence judgment and behavior when a situation is ambiguous . . . Individuals rely more, consciously or unconsciously, on prejudice and stereotypes when attempting to resolve uncertain circumstances."). We cannot allow the reasonable suspicion standard to be satisfied by behavior as ambiguous as three Black men acting very cautiously and showing no reaction to a police spotlight shining into their vehicle on a roadway late at night. Given the history of racism in this country

[6] In New Jersey, Black people are three times more likely to face some type of police force than whites. See Disha Raychaudhuri and Stephen Stirling, Black People In N.J. Say They're More Likely To Be Punched, Kicked By Cops. Now, Data Backs That Up, NJ Advance Media (Dec. 16, 2018).

and racial dispartities in our policing system, such a reaction is a natural response.

Putting the alleged non-response to the spotlight aside, this leaves only the race and gender of the occupants in the vehicle as the basis for the stop. This Court has cautioned on more than one occasion that a stop based merely on a suspect's race "cannot be squared with the values that inhere in the Fourth Amendment and Article I, Paragraph 7 of our State Constitution." Shaw, 213 N.J. at 421. For that reason, "[a] random stop based on nothing more than a non-particularized racial description of the person sought is especially subject to abuse." Ibid.; see also State v. Maryland, 167 N.J. 471, 485 (2001) ("[A]n investigatory stop predicated solely on race would be equally defective."); see also State v. Caldwell, 158 N.J. 452, 468 (1999) (Handler, J., concurring)("Race alone is not a specific and articulable fact sufficient to establish the reasonable, particularized suspicion needed for an investigatory stop of a defendant. Adding gender to race does not augment the description of the suspect so that he could fairly be picked out by officers intending to investigate."). In State v. Maryland, 167 N.J. at 485, the Court held that an investigatory stop based solely on a defendant's race failed to satisfy the objective reasonableness standard, and police lacked a reasonable and particularized suspicion of criminal activity to

justify the investigatory stop of the defendant in a Rahway train station.

Absent any other facts to support Sergeant Horan's suspicion, as set forth above, his only remaining basis for stopping the vehicle in which Defendant was riding as a passenger was due to the race and gender of the occupants. Simply put, the car was stopped because all three occupants were Black men. By that logic, Sergeant Horan would have stopped any car he encountered that was occupied by one or more Black men, thus undermining any suggestion that the facts here were particularized. This type of overt, racial profiling, without more to justify a reasonable suspicion, contravenes the constitutional protections of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution, as well as the Court's settled jurisprudence. Indeed, the essence of the Fourth Amendment is that persons -- no matter what their race or gender -- are free to go about their business without interference from police.

Sergeant Horan's testimony regarding his basis for the investigatory stop of Defendant amounts to a series of hunches. The law demands more than an officer's best guesswork for any search or seizure to be deemed lawful. Hence, the State plainly failed to meet its burden of proof that the stop was based on specific and articulable facts that give rise to a reasonable suspicion of criminal activity, by a preponderance of the evidence.

The Appellate Division properly reversed the trial court's denial of Defendant's motion to suppress.

II. RACIAL PROFILING SIGNIFICANTLY UNDERMINES TRUST IN OUR CRIMINAL JUSTICE SYSTEM AND MAKES THE STATE LESS SAFE FOR EVERYONE.

Amicus NCLO is an organization comprised of current and former Latino police officers, some of whom have personally experienced racial profiling or who have had family members or friends who have experienced racial profiling. NCLO is thus in a unique position to foresee the impact that this Court's decision will have both upon minority members of the public and also upon law enforcement officers who rely upon positive relationships with the community to perform their jobs and keep the public safe. If the Court allows people of color to be subject to search and seizure based solely upon their race and gender, as in this case, it will undoubtedly foster additional distrust in our entire criminal justice system, make the jobs of law enforcement officers more difficult, make it harder to investigate and prosecute crimes, and make the public as a whole less safe.

NCLO's members have realized through their decades of collective law enforcement experience that strong police-community ties are essential for law enforcement agencies to operate effectively and to protect the community. "The police, one of the foundations of the criminal justice system, must ensure the public trust if the system is to perform its mission to the fullest."

U.S. Dep't of Justice, Office of Community Oriented Policing Services & Office of Justice Programs, Nat'l Institute of Justice, Police Integrity – Public Service with Honor 7 (January 1997). Mutual trust between the community and the police benefits both the police and the community in many ways:

> When there is trust between law enforcement and the community, the community benefits because law enforcement officers place primacy on the community's wellbeing and understand the weight of their responsibility. Police, in turn, benefit from working in a community that appreciates their role in promoting safety and actively supports that common goal.
>
> [Debo P. Adegbile, Policing Through an American Prism, 126 Yale L.J. 2222, 2232 (2017).]

Strong community-police relations also make it easier for police to perform their law enforcement duties. When law enforcement officers have earned the trust and respect of the public, community members are more likely to comply with police commands, come forward as witnesses to crimes, and report crimes that are perpetuated against them. See Tracey Meares & Tom Tyler, Policing: A Model for the Twenty-First Century, *in* Policing the Black Man 165 (Angela J. Davis ed., 2018) ("If the police are trusted, then people are more likely to give them the benefit of the doubt, allowing them to investigate and to respond to contentious law enforcement actions."); Rachel Macht, Should Police Misconduct Files be Public Record? Why Internal Affairs

Investigations and Citizen Complaints Should be Open to Public Scrutiny, 45 Crim. L. Bull. 1006 (2009) ("Public confidence in police can result in a citizenry more likely to obey commands and more likely to cooperate with law enforcement."); Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1162 (2000) ("An individual who trusts law enforcement is more likely to follow its commands; conversely, an untrustworthy police force may confront a substantially less obedient citizenry.").

When police departments work to earn the community's respect and cooperation, that in turn reduces crime:

> Clearly, focusing on public trust and confidence in the context of policing is not inconsistent with an agency's commitments to other goals, including crime reduction. . . . Studies similarly suggest that building trust in the police, the courts, and the law is as effective or even more effective a long-term crime-control approach. When people have greater trust in the police, they are more likely both to obey the law and to cooperate with the police and engage with them. Legitimacy facilitates crime control both directly, because it lowers people's likelihood of committing crimes, and indirectly, because it increases public cooperation, which allows the police to solve more crimes.
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> [Meares & Tyler, Policing: A Model for the Twenty-First Century, at 167.]

These are not just the opinions of NCLO or academic scholars, but also the views of most people who work in law enforcement. Studies have shown that ninety percent of police officers agree

that it is important for an officer to "know the people, places, and the culture in the areas where they work in order to be effective at their job." Adegbile, 126 Yale L.J. at 2240. According to a national survey by the Police Executive Research Forum of nearly 300 police agencies that implemented some form of community policing, "more than ninety percent of agencies reported improved police-citizen cooperation, increased involvement of citizens, increased information from citizen to police, and improved citizen attitudes toward police" when police actively engaged in building trust with the community. Id. at 2245. In those instances, "[a]lmost eighty percent of agencies reported reduced police-citizen physical conflict." Ibid.

Despite how important community trust is, polls show that more than half of the general public lacks confidence in police officers. See Aimee Ortiz, Confidence in Police Is at Record Low, Gallup Survey Finds, N.Y. Times (Aug. 12, 2020) ("For the first time in its 27 years of measuring attitudes toward the police, Gallup found that a majority of American adults do not trust law enforcement."). When surveys are broken down by race, the level of trust in police dips even further. Ibid. (finding that only 19 percent of Black adults had confidence in the police). See also Katherine J. Bies, Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct, 28 Stan. L. & Pol'y Rev. 109, 120 (2017) ("Research consistently shows that

people of color are more likely than white individuals to view law enforcement with suspicion and distrust."). It is imperative that this trust be increased, not further undermined.

Therefore, NCLO encourages the Court to affirm the Appellate Division's decision below in Nyema. Any holding that permits a police officer to stop a person based solely upon their race and gender would not only be an injustice that itself is harmful to people of color, but would also further undermine trust in the police and would make it increasingly difficult for officers to ensure public safety for everyone.

CONCLUSION

The Court should affirm the Appellate Division's decision in Nyema. In accordance with that decision, the Court should also reverse in Myers.

Respectfully Submitted,

/s/ CJ Griffin
CJ Griffin, Esq.

May 3, 2021

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. Peter Nyema (A-39-20) (085146)
State v. Jamar J. Myers (A-40-20) (082858)

Argued October 25, 2021 -- Decided January 25, 2022

PIERRE-LOUIS, J., writing for a unanimous Court.

In this case, the Court considers whether reasonable and articulable suspicion existed when a police officer conducted an investigatory stop of the vehicle in which defendants Peter Nyema and Jamar Myers were riding with co-defendant Tyrone Miller.

Around midnight on May 7, 2011, a 7-Eleven was robbed. At approximately 12:15 a.m., Sergeant Mark Horan of the Hamilton Township Police Department received a transmission about the armed robbery, which "had just occurred." Horan testified that the dispatch described the suspects "as two Black males, one with a handgun." Horan activated the lights and sirens on his marked patrol car and drove towards the 7-Eleven.

Approximately three-quarters of a mile from the 7-Eleven, Horan saw a car approaching in the oncoming traffic lane. Using the spotlight mounted to his police vehicle to illuminate the inside of the car, he observed that the occupants were a man and a woman and let them pass. Sergeant Horan testified that as he continued on, a second set of headlights approached. He illuminated the inside of the vehicle and observed three Black males; "[t]he description of the suspects was two Black males so at that point I decided to issue a motor vehicle stop on the second vehicle." Horan later explained that he was also struck by the lack of reaction to the spotlight by the occupants of the car, and that he "took into consideration the short distance from the scene, as well as the short amount of time from the call" as he made the stop.

Upon stopping the vehicle, Sergeant Horan radioed headquarters with the license plate number and a description of the car, and two more officers arrived. Before he approached the vehicle, Horan learned from one of the other officers that the robbery suspects had been wearing dark or black clothing or jackets. As he approached, Horan observed "some dark jackets" on the unoccupied rear passenger seat and on the floor of the vehicle. Horan spoke with the driver, who was later identified as Miller. Nyema was sitting in the passenger seat and Myers was in the rear passenger-side seat. The dispatcher advised Horan that the vehicle had been reported stolen. All three occupants were placed under arrest.

More officers arrived on the scene, and while several officers secured the arrestees, others assisted Horan in searching for a weapon. First, Horan retrieved the clothing he had observed from the backseat of the vehicle. Then, he and the other officers searched other parts of the vehicle, locating additional clothing in the trunk and a black semi-automatic handgun under the hood. Searches of the men themselves yielded just under $600 cash. Approximately $600 was reported stolen from the 7-Eleven. The vehicle was then impounded, and police transported the three men to the police station.

Miller pled guilty to two weapons offenses and agreed to testify against Nyema and Myers, who jointly moved to suppress the physical evidence seized from the stop. The trial court granted the motion in part as to the items seized from the trunk and the hood. But the court found that the initial stop was supported by reasonable and articulable suspicion, that the retrieval of clothing from the interior of the vehicle was permitted under the plain view exception to the warrant requirement, and that the money was lawfully seized incident to defendants' arrest. As to the robbery of the 7-11, both Myers and Nyema pled guilty to first-degree robbery.

Both defendants appealed from the partial denial of their motion to suppress. In Myers's case, the Appellate Division affirmed. In Nyema's case, the Appellate Division held that the stop was not based on reasonable and articulable suspicion. 465 N.J. Super. 181, 185 (App. Div. 2020). Accordingly, Nyema's conviction was reversed, his sentence vacated, and the matter remanded for further proceedings. Ibid.

The Court granted certification in Nyema. 245 N.J. 256 (2021). On reconsideration, it granted certification in Myers "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." 245 N.J. 250, 251 (2021).

HELD: The only information the officer possessed at the time of the stop was the race and sex of the suspects, with no further descriptors. That information, which effectively placed every single Black male in the area under the veil of suspicion, was insufficient to justify the stop of the vehicle and therefore does not withstand constitutional scrutiny.

1. Searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and are invalid unless they fall within one of the few well-delineated exceptions to the warrant requirement. The exception at issue in this case is an investigative stop, a procedure that involves a relatively brief detention by police during which a person's movement is restricted. An investigative stop or detention does not offend the Federal or State Constitution, and no warrant is needed, if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity. (pp. 21-22)

2. Although reasonable suspicion is a less demanding standard than probable cause, neither inarticulate hunches nor an arresting officer's subjective good faith suffices.

Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of the totality of circumstances surrounding the police-citizen encounter. In many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention. In State v. Shaw, 213 N.J. 398 (2012), and State v. Caldwell, 158 N.J. 452 (1999), the Court determined that police lacked reasonable suspicion to conduct an evidentiary stop based on descriptions limited to the race and sex of the suspect. The Court reviews those cases in detail and notes that even inquiries or investigative techniques that do not qualify as searches and seizures must still comport with the Equal Protection Clause. And New Jersey jurisprudence is well-settled that seemingly furtive movements, without more, are insufficient to constitute reasonable and articulable suspicion. The totality of the circumstances of the encounter must be considered in a fact-sensitive analysis to determine whether officers objectively possessed reasonable and articulable suspicion to conduct an investigatory stop. (pp. 23-27)

3. Applying those principles, the Court does not find that the information Sergeant Horan possessed at the time of the motor-vehicle stop constituted reasonable and articulable suspicion. Certainly, race and sex -- when taken together with other, discrete factors -- can support reasonable and articulable suspicion. But here, the initial description did not provide any additional physical descriptions that would differentiate the two Black male suspects from any other Black men in New Jersey. And the radio dispatch indicated that the store was robbed by two Black men. Sergeant Horan testified that upon seeing three Black males in the vehicle, he inferred that the third was the getaway driver. While Sergeant Horan's inference was reasonable, the reality is that the ambiguous nature of the description could have resulted in Black men in any configuration and using any mode of transportation being stopped because the only descriptors of the suspects were race and sex. Sergeant Horan saw the clothing and learned the car had been reported stolen after the stop, but information acquired after a stop cannot retroactively serve as the basis for the stop. Defendants' non-reaction to the spotlight -- like nervous behavior that courts have reasonably found not to support reasonable suspicion -- did not justify the stop. And even considering the closeness of Sergeant Horan's encounter with defendants in terms of spatial and temporal proximity to the robbery does not add significantly to the analysis of whether the stop was lawful because the 7-Eleven was located on a roadway close to a major interstate highway and the record is unclear as to when the robbery actually occurred. The non-specific and non-individualized factors asserted here do not add up to a totality of circumstances analysis upon which reasonable suspicion can be found. Zero plus zero will always equal zero. (pp. 28-33)

AFFIRMED in Nyema; REVERSED and REMANDED in Myers.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

SUPREME COURT OF NEW JERSEY

A-39 September Term 2020

A-40 September Term 2020

085146 and 082858

State of New Jersey,

Plaintiff-Appellant,

v.

Peter Nyema, a/k/a
Pete Dinah, Kareem T. Jeffries,
Hne Nyema, and Pete Nyme,

Defendant-Respondent.

State of New Jersey,

Plaintiff-Respondent,

v.

Jamar J. Myers,

Defendant-Appellant.

State v. Peter Nyema (A-39-20):
On certification to the Superior Court,
Appellate Division, whose opinion is reported at
465 N.J. Super. 181 (App. Div. 2020).

State v. Jamar J. Myers (A-40-20):
On certification to the Superior Court,
Appellate Division.

Argued	Decided
October 25, 2021	January 25, 2022

Michael D. Grillo, Assistant Prosecutor, argued the cause for appellant in State v. Nyema (A-39-20) and respondent in State v. Myers (A-40-20) (Angelo J. Onofri, Mercer County Prosecutor, attorney; Randolph E. Mershon, III, Assistant Prosecutor, of counsel and on the briefs, and Laura Sunyak, Assistant Prosecutor, on the briefs).

Alyssa Aiello, Assistant Deputy Public Defender, argued the cause for respondent in State v. Nyema (A-39-20) (Joseph E. Krakora, Public Defender, attorney; Alyssa Aiello, of counsel and on the briefs).

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant in State v. Myers (A-40-20) (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the briefs).

Steven A. Yomtov, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey in State v. Nyema (A-39-20) and in State v. Myers (A-40-20) (Andrew J. Bruck, Acting Attorney General, attorney; Carol M. Henderson, Assistant Attorney General, of counsel, and Steven A. Yomtov, of counsel and on the briefs).

Alexander Shalom argued the case for amicus curiae 66 Black ministers and other clergy members in State v. Nyema (A-39-20) and in State v. Myers (A-40-20) (American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom, Jeanne LoCicero, and Karen Thompson, on the briefs).

Raymond Brown argued the cause for amici curiae Latino Leadership Alliance of New Jersey and National Coalition of Latino Officers in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Pashman Stein Walder

Hayden, attorneys; CJ Griffin and Darcy Baboulis-Gyscek, on the briefs).

Robert J. DeGroot argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Oleg Nekritin, on the briefs).

Joseph M. Mazraani submitted a brief on behalf of amicus curiae Kristin Henning of the Georgetown Law Juvenile Justice Clinic & Initiative in State v. Nyema (A-39-20) and State v. Myers (A-40-20) (Mazraani & Liguori, and Georgetown Juvenile Justice Clinic & Initiative, attorneys; Joseph M. Mazraani, and Kristin Henning, of the District of Columbia bar, admitted pro hac vice, on the briefs).

Jonathan Romberg submitted a brief on behalf of amicus curiae Seton Hall University School of Law Center for Social Justice in State v. Myers (A-40-20) (Seton Hall University Scott of Law Center for Social Justice, attorneys; Jonathan Romberg, of counsel and on the brief).

JUSTICE PIERRE-LOUIS delivered the opinion of the Court.

In this case, we must determine whether reasonable and articulable suspicion existed when a police officer conducted an investigatory stop of the vehicle in which defendants were riding. After the robbery of a 7-Eleven store in Hamilton, police dispatch alerted officers that the suspects were two Black males, one armed with a gun. Sergeant Mark Horan heard the radio transmission and made his way to the scene. While en route, Sergeant Horan

used the mounted spotlight on his marked police car to illuminate the interior of passing vehicles in order to search for the robbery suspects. In the first vehicle Horan encountered, a man and a woman reacted with annoyance and alarm when Horan shone the spotlight into their car. When Horan came across a second vehicle, approximately three-quarters of a mile from the store, he illuminated the interior of the car with the spotlight and saw three Black males inside. According to Horan, the men did not react to the spotlight at all. Horan viewed that non-reaction as "odd" considering the reaction of the passengers in the first car. At that point, the only information Horan had about the robbery was that the suspects were two Black males, one with a gun, who fled the robbery on foot. Dispatch had not provided any additional identifiers.

Based on the race and sex of the occupants and their non-reaction to the spotlight, Sergeant Horan executed a motor vehicle stop of the car. After stopping the car, Horan learned that the vehicle had been reported stolen so defendants were placed under arrest. A search of the car revealed dark clothing -- clothes matching what the suspects were wearing during the robbery -- and a handgun hidden under the hood of the car.

Defendants Peter Nyema, Jamar Myers, and a third co-defendant were charged with a host of offenses related to the 7-Eleven robbery. Nyema and Myers jointly moved to suppress the items seized during the search of the

vehicle, arguing that the stop was unlawful because it was not based on reasonable suspicion. The trial court denied the motion to suppress and both Myers and Nyema eventually pled guilty to first-degree robbery.

In separate appeals, both men challenged the denial of the motion to suppress, resulting in opposite Appellate Division outcomes. In Myers's appeal, an Appellate Division panel affirmed the trial court's denial of the motion to suppress, ruling that the stop was supported by reasonable suspicion. In Nyema's appeal, a different Appellate Division panel reversed the trial court and vacated Nyema's conviction and sentence, finding that Sergeant Horan did not have reasonable suspicion to conduct the stop of the car.

We granted both defendants' petitions for certification on the question of whether reasonable and articulable suspicion existed to stop the car. We now reverse the Myers decision and affirm in Nyema. The only information the officer possessed at the time of the stop was the race and sex of the suspects, with no further descriptors. That information, which effectively placed every single Black male in the area under the veil of suspicion, was insufficient to justify the stop of the vehicle and therefore does not withstand constitutional scrutiny.

I.

We rely on the testimony developed at the evidentiary hearing on defendants' motion to suppress for the following summary.

Around midnight on May 7, 2011, a 7-Eleven in Hamilton, New Jersey was robbed. At approximately 12:15 a.m., Sergeant Mark Horan of the Hamilton Township Police Department received a transmission about the armed robbery, which "had just occurred." Horan testified that the dispatch described the suspects "as two Black males, one with a handgun."

Horan activated the lights and sirens on his marked patrol car and drove towards the 7-Eleven at a "relatively high speed" for one to two minutes, shutting off the lights and sirens as he drew closer. According to Sergeant Horan, traffic was light because it was late at night. Approximately three-quarters of a mile from the 7-Eleven, Horan saw a car approaching in the oncoming traffic lane. Using the spotlight mounted to his police vehicle to illuminate the inside of the car,[1] he observed that the occupants were a man and a woman and let them pass. Sergeant Horan testified as follows:

> I continued on. The second set of headlights approached me, I illuminated the inside of that vehicle and I observed three Black males, you know, that went past me.

[1] This was not a standard procedure sanctioned by the Hamilton Police Department, but a technique that Horan employed while searching for suspects at night.

> The description of the suspects was two Black males so at that point I decided to issue a motor vehicle stop on the second vehicle.

He would later explain that the man and the woman in the first vehicle reacted to the spotlight with "alarm or annoyance," and that the "driver shielded his eyes a little bit." In contrast, the occupants of the second vehicle, including defendants, showed no reaction and kept looking straight ahead. Horan testified that the occupants of the second vehicle "were all males, Black males. And I received no response from any of them that I could observe, no one looked at me, no one turned towards the car. It was as if I wasn't there." He explained that this non-reaction "struck [him] as odd." He further testified that it was his "experience that sometimes people who prefer not to be noticed tend to ignore the spotlight."

Upon witnessing the non-reaction of the vehicle's occupants, Horan activated his lights and executed a stop of the second vehicle. Horan testified that at the time of the stop,

> [t]he sex and race were consistent with that of the description. I had three occupants in the vehicle. The suspects were described at the time of the call as two. So I had, at least, that. I took into consideration the short distance from the scene, as well as the short amount of time from the call and all those things considered is what I took into consideration to effect the stop.

Upon stopping the vehicle, Sergeant Horan radioed headquarters with the license plate number and a description of the car -- a 2000 silver Toyota Corolla with Pennsylvania license plates.

Two more officers arrived just as Horan was exiting his patrol car. All three approached the vehicle with their weapons drawn. Horan ordered the driver to turn off the engine and told all occupants to place their hands on the roof. Before he approached the vehicle, Horan learned from one of the other officers that the robbery suspects had been wearing dark or black clothing or jackets. As he approached, Horan observed "some dark jackets" on the unoccupied rear passenger seat and on the floor of the vehicle.

Horan spoke with the driver, who was later identified as co-defendant Tyrone Miller, a/k/a Ajene Drew. Nyema was sitting in the passenger seat and Myers was in the rear passenger-side seat. The dispatcher asked Horan to confirm the license plate number and when he did, the dispatcher advised Horan that the vehicle had been reported stolen. All three occupants were then removed from the vehicle and placed under arrest.

More officers arrived on the scene, and while several officers secured the arrestees, others assisted Horan in searching for a weapon. First, Horan retrieved the clothing he had observed from the backseat of the vehicle. Then, he and the other officers searched other parts of the vehicle, locating additional

clothing in the trunk and a black semi-automatic handgun wrapped in a red bandana under the hood. Searches of the men themselves yielded just under $600 cash. Approximately $600 was reported stolen from the 7-Eleven robbery. The vehicle was then impounded, and police transported the three men to the police station.

II.

On August 23, 2011, a Mercer County grand jury charged Nyema, Myers, and Miller in a multiple count indictment.

All three men were charged with first-degree robbery, as well as theft, aggravated assault, terroristic threats, several weapons offenses, and theft by receiving stolen property. They were each also charged with conduct-specific counts related to the theft of the car or the arrest, and Miller was charged with possession of a firearm as a felon.

Miller pled guilty to two second-degree weapons offenses and agreed to testify against Nyema and Myers.

A.

Nyema and Myers jointly moved to suppress the physical evidence seized from the stop. During a three-day evidentiary hearing, the trial court heard testimony from Sergeant Horan; Nyema's father, who owned the vehicle and who testified that it had not been reported stolen; and Detective William

Mulryne, who testified that he had personally taken the stolen vehicle report from Nyema's father several days before the car stop.

The trial court granted the motion in part and denied it in part, suppressing the handgun found under the hood of the car but ruling that the clothing and money had been lawfully seized. The court reasoned that because the initial stop was supported by reasonable and articulable suspicion, the retrieval of the clothing from the interior of the vehicle was permitted under the plain view exception to the warrant requirement and the money was lawfully seized incident to defendants' arrest. However, the trial court found that the full warrantless search of the vehicle, including the trunk and hood, which yielded the handgun, could not be justified by exigent circumstances because the vehicle's occupants were already securely in custody and the vehicle was located in a residential neighborhood shortly after midnight.

Although the court found that defendants did not have a reasonable expectation of privacy in the vehicle because it had been reported stolen, the court explained that a lack of privacy interest was not a valid substitute for probable cause; rather, it was only one factor in determining whether exigent circumstances justified a warrantless search. The court concluded that the officers could have simply impounded the vehicle and searched it back at the police precinct or applied for a warrant while at the scene.

In upholding Horan's reasonable suspicion for the initial car stop, the court noted that the stop occurred close to the robbery in terms of both time and space; that Horan observed the vehicle approaching from the direction of the crime scene; that the vehicle's occupants "gave no response whatsoever to the lights shone on them, made no eye contact whatsoever"; and "[a]lso, to be quite honest, the racial makeup of the occupants of the vehicle, three Black males traveling away from the scene."

B.

Myers -- Guilty Plea and Sentencing

On November 29, 2016, Myers pled guilty to first-degree robbery of the 7-Eleven, reserving his right to appeal several evidentiary rulings, including the denial of his motion to suppress based on the stop. Myers also pled guilty to first-degree felony murder on an unrelated indictment[2] and entered guilty pleas to three violations of probation.

On July 7, 2017, Myers was sentenced to a term of thirty years for the unrelated felony murder, with no possibility of parole, and a concurrent term of twelve years, subject to the No Early Release Act (NERA), for the armed

[2] In February 2014, Myers was charged in a second indictment related to two offenses that occurred in Trenton on April 29, 2011 -- an attempted robbery of one pharmacy and the completed robbery of another pharmacy, during which the pharmacist was shot and killed.

robbery of the 7-Eleven. For the probation violations, Myers was sentenced to five years.

Myers appealed, arguing, among other things, that the joint motion to suppress should have been granted in its entirety because the initial stop was not based on reasonable suspicion and, furthermore, that the plain view exception to the warrant requirement did not justify the officers' entry into the vehicle.

The Appellate Division affirmed the trial court's rulings and Myers's conviction. Regarding the motion to suppress, the court noted that the trial court had specifically rejected Myers's argument that the stop was based solely on defendants' race and sex. Rather, the Appellate Division found that

> the trial court pointed out that the suspects were reported to be African-American and, therefore, there was a reasonable and particularized suspicion to conduct an investigatory stop of a vehicle with African-American men inside when that vehicle was seen a short distance from the 7-Eleven in the early morning when there were few other cars on the road.

The Appellate Division concluded that "those factual findings are supported by the evidence in the record" and that there was therefore no basis for reversal. The court also affirmed the trial court's ruling that seizure of the clothing from the backseat of the vehicle was justified by the plain view exception to the warrant requirement. This Court denied Myers's petition for

certification seeking review of the denial of his motion to suppress. 240 N.J. 22 (2019).

C.

Nyema -- Trial, Guilty Plea and Sentencing

On September 20, 2017, a jury trial proceeded in Nyema's case. After the State rested, Nyema entered an open guilty plea to first-degree robbery. Nyema's sentencing took place almost a year later on September 6, 2018, immediately after an unsuccessful motion to withdraw his guilty plea. The court sentenced Nyema to a custodial term of fifteen years, subject to NERA.

Like Myers, Nyema appealed the partial denial of the joint motion to suppress, arguing that police lacked reasonable suspicion to conduct the initial stop and that, even if the stop had been lawful, the officers' warrantless entry into the vehicle to seize clothing from the backseat was not justified by the plain view exception.

The Appellate Division held that the stop was not based on reasonable and articulable suspicion. State v. Nyema, 465 N.J. Super. 181, 185 (App. Div. 2020). Accordingly, Nyema's conviction was reversed, his sentence vacated, and the matter remanded for further proceedings. Ibid.

The Appellate Division rejected the trial court's conclusion that Nyema lacked a reasonable expectation of privacy in the vehicle because it had been

reported stolen. Id. at 189. In the court's view, although evidence had been presented to indicate that the vehicle had been reported stolen, no testimony indicated that the vehicle actually was stolen and, therefore, Nyema retained a reasonable expectation of privacy in his father's car. Id. at 189-90. The court then considered whether the stop was based on a reasonable and articulable suspicion. Id. at 190. The court summarized Sergeant Horan's testimony on why he stopped the vehicle as: "(1) a store had been robbed by two Black men; (2) the car was within three quarters of a mile from the store, traveling away from it; and (3) the three Black men in the car did not react to the spotlight he pointed into their vehicle." Id. at 191.

The court explained that "[t]he men's non-reaction to the light does not add much to a reasonable articulable suspicion" because Horan only observed them for a second or two as they drove by. Ibid. Furthermore, the court noted that the record "does not establish how much time passed between when the robbery occurred and the car was stopped"; therefore, it was unclear "whether Horan had a reasonable basis to assume the perpetrators were still in the area." Id. at 192.

The court found that "[k]nowledge of the race and gender of criminal suspects, without more, is insufficient suspicion to effectuate a seizure." Ibid. Because Horan's information amounted to little more than the race and sex of

the criminal suspects, it amounted only to a hunch, not to reasonable suspicion. Ibid. To hold otherwise "would mean that the police could have stopped all cars with two or more Black men within a three-quarters-of-a-mile radius of the 7-Eleven store." Ibid.

The State petitioned this Court for certification, arguing that the Nyema decision directly conflicted with Myers and improperly focused "solely upon the suspect's description."

This Court granted the State's petition for certification. 245 N.J. 256 (2021). Because the Appellate Division's published opinion in Nyema's case held that Horan did not have reasonable suspicion to stop the car based on the same exact set of facts in Myers's case, Myers filed a motion for reconsideration of his petition for certification. This Court granted Myers's motion for reconsideration, "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." 245 N.J. 250, 251 (2021).

III.

A.

With regard to Myers, the State contends that the Appellate Division correctly upheld the trial court's finding that there was reasonable and

articulable suspicion to stop the vehicle based on the evidence in the record. The State urges this Court to affirm that holding.

Regarding Nyema, the State argues that the Appellate Division decision should be reversed and Nyema's conviction reinstated. The State contends that, in addition to the defendants' race and sex, the motion court found reasonable suspicion based on (1) the short duration between the initial robbery report and the stop; (2) the location and direction of the vehicle in relation to the 7-Eleven; (3) the presence of three individuals in the car, giving rise to the inference that the two robbers had been joined by a getaway driver; and (4) the occupants' non-reaction to the spotlight.

As for the time, the State argues that the Nyema decision was incorrect in finding that the State failed to present evidence establishing how much time elapsed between the robbery and the stop. To the contrary, the State notes that Sergeant Horan testified that he saw the defendants' vehicle about two or three minutes after receiving the report that a robbery had "just occurred." Regarding defendants' behavior when Sergeant Horan used the spotlight on the second vehicle, the State argues that Nyema erred by discounting the defendants' non-reaction to the spotlight, particularly because that response contrasted so starkly with the reaction of the occupants of the previous vehicle.

According to the State, "[t]he defendants' abnormal non-reaction suggested a calculated effort on the part of all three defendants to avoid detection."

B.

The Attorney General, appearing as amicus curiae, takes no position regarding whether the investigatory stop in this case should be upheld. The Attorney General appears for the limited purpose of reiterating that racial profiling, in all its forms, must be eliminated from policing decisions. The Attorney General asserts that consideration of a person's race or ethnicity -- in drawing an inference that an individual may be involved in criminal activity or in exercising police discretion with respect to how the officer will deal with that person -- will not be tolerated and is prohibited by Attorney General Law Enforcement Directive No. 2005-1, which established a statewide policy prohibiting the practice of "Racially-Influenced Policing." The Attorney General notes, however, that under Directive No. 2005-1, when race is a descriptive factor in connection with a "Be-On-The-Lookout" announcement, or a pre-existing investigation into a specific criminal activity, it may be deemed an objective identifier. The Attorney General emphasizes that the correct legal standard for adjudicating whether reasonable suspicion exists is the totality-of-the-circumstances test.

C.

Because defendants' arguments are substantially similar, we consider them together.

Myers argues that the stop was not supported by reasonable suspicion because "[t]he only similarities between the description of the suspects and the men are their race and gender." He emphasizes that the officer stopped a car occupied by three Black men based only on a report that two Black men had fled on foot after a nearby robbery. Myers argues that "there was no description of the suspects other than their race," and that "accept[ing] this meager description as constituting reasonable suspicion" would allow police to have stopped any number of Black men, whether in a car or on foot, within a three-quarter-mile radius of the crime scene.

Nyema takes the same position as Myers. Nyema argues that the Appellate Division decision in his case correctly concluded that reasonable suspicion did not exist. Analyzing the stop based on the totality of the circumstances, Nyema contends that both the proximity to the 7-Eleven and the defendants' non-reaction to the spotlight "provided zero basis for reasonable suspicion," leaving only a description of the two Black men fleeing on foot to establish reasonable suspicion for the stop.

D.

Several amici support defendants' positions.

Black Ministers and Other Clergy Members (collectively, Clergy members) argue that the other factors in this case -- proximity to the crime scene and the non-reaction to the spotlight -- fail to create reasonable and articulable suspicion. The Clergy members also contend that race-based stops cause tremendous harm and are unreasonable because they fail to meaningfully limit the number of people subjected to them. Furthermore, such stops involve an aggravated or uncomfortable response from Black motorists, which may result from a legitimate fear of potential violence from law enforcement. The Clergy members recommend that this Court create a prophylactic rule preventing police officers from effectuating stops where the only or predominant basis for the stop is that the stopped individuals match the race and gender of the suspects.

The Association of Criminal Defense Lawyers of New Jersey (ACDL) argues that this Court must affirm in Nyema and reverse in Myers because law enforcement impermissibly stopped the defendants on the basis of race. The ACDL reasons that racial profiling has been a historically pervasive problem and that investigative stops based on race are unconstitutional.

Amicus the Seton Hall University School of Law Center for Social Justice (the Center) argues that the suspects' non-reaction, location, and description provided no individualized basis for reasonable suspicion. Regarding location, the Center reasons that defendants' location provided no basis for individualized suspicion because the suspects could have driven in any direction away from the 7-Eleven and been anywhere within a fifty-mile radius of the store. The Center argues that the suspects' description provided no basis for reasonable suspicion other than identifying Black males, which was an impermissible basis for an investigatory stop.

In their joint amicus brief, the Latino Leadership Alliance of New Jersey (LLANJ) and the National Coalition of Latino Officers (NCLO) argue that the State failed to prove that police had reasonable suspicion to conduct an investigatory stop of the vehicle based on specific and articulable facts. Further, the LLANJ and NCLO contend that racial profiling significantly undermines trust in the criminal justice system and makes the state less safe for everyone.

Amicus Kristin Henning, Director of the Georgetown Law Juvenile Justice Clinic & Initiative, argues that there was no rational basis to believe that the men's non-reaction to the officer shining the light into the car had any bearing on suspicion. Furthermore, Henning contends that implicit racial bias

thrives when officers rely on vague, race-based descriptions. In this case, the description relied solely on race and sex, which is insufficient to constitute reasonable and articulable suspicion. Henning argues that race-based over-policing weakens constitutional protections and harms individuals, communities, and public safety.

IV.

A.

Our standard of review on a motion to suppress is deferential -- we must "uphold the factual findings underlying the trial court's decision so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Ahmad, 246 N.J. 592, 609 (2021) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). This Court defers to those findings in recognition of the trial court's "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). A trial court's legal conclusions, however, and its view of "the consequences that flow from established facts," are reviewed de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

B.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language,

protect against unreasonable searches and seizures. Under both Constitutions, "searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Elders, 192 N.J. at 246 (citations omitted). Consequently, "the State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure 'fell within one of the few well-delineated exceptions to the warrant requirement.'" Ibid. (quoting State v. Pineiro, 181 N.J. 13, 19-20 (2004)).

The exception at issue in this case is an investigative stop, a procedure that involves a relatively brief detention by police during which a person's movement is restricted. See State v. Rosario, 229 N.J. 263, 272 (2017) (describing an investigative stop as a police encounter during which an objectively reasonable person would not feel free to leave). When police stop a motor vehicle, the stop constitutes a seizure of persons, no matter how brief or limited. State v. Scriven, 226 N.J. 20, 33 (2016). An investigative stop or detention, however, does not offend the Federal or State Constitution, and no warrant is needed, "if it is based on 'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

Although reasonable suspicion is a less demanding standard than probable cause, "[n]either 'inarticulate hunches' nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights." State v. Stovall, 170 N.J. 346, 372 (2002) (Coleman, J., concurring in part and dissenting in part) (quoting State v. Arthur, 149 N.J. 1, 7-8 (1997)); accord State v. Alessi, 240 N.J. 501, 518 (2020). Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of "the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions." State v. Privott, 203 N.J. 16, 25-26 (2010) (quoting State v. Davis, 104 N.J. 490, 504 (1986)).

In many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention. In State v. Shaw, this Court determined that the police lacked reasonable suspicion to conduct an investigatory stop when law enforcement arrived at a multi-unit apartment building to execute an arrest warrant for a Black, male fugitive. 213 N.J. 398, 401, 403 (2012). There, the police saw the

defendant, also a Black male, exit the building with a friend and immediately separate, seemingly because he saw the officers. Id. at 403. "[T]he only features that [the testifying officer] could say that [the defendant] shared in common with the targeted fugitive were that both were Black and both were men." Ibid. That commonality was insufficient to justify the stop, even in conjunction with the officer's belief that the two men split up to avoid police attention. See id. at 411-12.

In State v. Caldwell, police acting on a tip from an informant conducted an investigatory stop of the defendant based on a description that the individual sought was a Black man standing in front of a building. 158 N.J. 452, 454-55 (1999). In invalidating the stop, this Court found that the "description of the suspect . . . was clearly inadequate" and explained that "police must have a sufficiently detailed description of the person to be able to identify that person as the suspect named by the informant." Id. at 460. The Court concluded that "[w]ithout such a requirement, police could theoretically conduct wide-ranging seizures on the basis of vague general descriptions." Ibid. The Court further noted that the tip lacked physical descriptors such as "the individual's height, weight, or the clothing he was wearing," and it included "no distinguishing characteristics that would have assisted [the officer] in making a positive identification of the suspect." Ibid.

In his concurring opinion, Justice Handler pointed out that "[r]ace alone is not a specific and articulable fact sufficient to establish the reasonable, particularized suspicion needed for an investigatory stop of a defendant. Adding gender to race does not augment the description of the suspect so that he could fairly be picked out by officers intending to investigate." Id. at 468 (Handler, J., concurring). In Justice Handler's view, the minimal description that consisted simply of the race and sex of the individual was "descriptive of nothing" in the constitutional context. Ibid.

New Jersey courts, moreover, have noted that even inquiries or investigative techniques that do not qualify as searches and seizures and therefore do not require reasonable and articulable suspicion must still comport with the Equal Protection Clause. See, e.g., State v. Maryland, 167 N.J. 471, 484 (2001) ("[T]he questioning of [a] defendant as part of a field inquiry is not sustainable if the officers approached him and his companions solely because of their race and age."); State v. Segars, 172 N.J. 481, 493 (2002) ("[I]f race is the sole motivation underlying the use of a M[obile] D[ata] T[erminal] [in checking the status of a driver's license], it is illegal . . . .").

Indeed, in 2005, the Attorney General issued Law Enforcement Directive 2005-1, which established a statewide policy prohibiting the practice of racially influenced policing. See Attorney General, Directive Establishing an

Official Statewide Policy Defining and Prohibiting the Practice of "Racially-Influenced Policing" (June 28, 2005) (Directive 2005-1). The Directive dictates that law enforcement officers are not to

> consider a person's race or ethnicity as a factor in drawing an inference or conclusion that the person may be involved in criminal activity, or as a factor in exercising police discretion as to how to stop or otherwise treat the person, except when responding to a suspect-specific or investigation-specific "Be on the lookout" (B.O.LO.) situation . . . .

The Directive further emphasizes that it does not prohibit officers "from taking into account a person's race or ethnicity when race or ethnicity is used to describe physical characteristics that identify a particular individual . . . being sought by a law enforcement agency in furtherance of a specific investigation or prosecution." Ibid.

In addition to the race and sex of the suspect, our courts have considered whether other factors such as nervous behavior, furtive movements, or other actions form the basis for reasonable and articulable suspicion. Our jurisprudence is well-settled that seemingly furtive movements, without more, are insufficient to constitute reasonable and articulable suspicion. See Rosario, 229 N.J. at 277 ("Nervousness and excited movements are common responses to unanticipated encounters with police officers on the road . . . ."); State v. Lund, 119 N.J. 35, 47 (1990) ("[M]ere furtive gestures of an occupant

of an automobile do not give rise to an articulable suspicion suggesting criminal activity." (quoting State v. Schlosser, 774 P.2d 1132, 1137 (Utah 1989))).

Similarly, when circumstances are not otherwise suspicious, "[a] person's failure to make eye contact with the police does not change that." State v. Stampone, 341 N.J. Super. 247, 252 (App. Div. 2001); see also United States v. Foster, 824 F.3d 84, 93 (4th Cir. 2016) (noting that lack of eye contact is an "ambiguous indicator" that "may still contribute to a finding of reasonable suspicion" but that courts are "hesitant" to weigh heavily "because it is no more likely to be an indicator of suspiciousness than a show of respect and an attempt to avoid confrontation." (quotation omitted)); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1419 n.6 (9th Cir. 1989) ("[A]voidance of eye contact has been deemed an inappropriate factor to consider unless special circumstances make innocent avoidance of eye contact improbable.") (alteration and quotation omitted); United States v. Smith, 799 F.2d 704, 707 (11th Cir. 1986) (finding the defendant-driver's failure to look at a patrol car to be "fully consistent with cautious driving" that "in no way gives rise to a reasonable suspicion of illegal activity either alone or in combination with the other circumstances surrounding the stop").

In sum, the totality of the circumstances of the encounter must be considered in a very fact-sensitive analysis to determine whether officers objectively possessed reasonable and articulable suspicion to conduct an investigatory stop. State v. Gamble, 218 N.J. 412, 431 (2014); Pineiro, 181 N.J. at 22.

V.

Applying those principles to the present case and taking into account the totality of the circumstances, we do not find that the information Sergeant Horan possessed at the time of the motor-vehicle stop constituted reasonable and articulable suspicion.

Sergeant Horan testified that he "believe[d] that the entirety of the initial dispatch" stated that there were "two suspects described as Black males, one with a handgun." Certainly, race and sex -- when taken together with other, discrete factors -- can support reasonable and articulable suspicion. But here, the initial description did not provide any additional physical descriptions such as the suspects' approximate heights, weights, ages, clothing worn, mode of transportation, or any other identifying feature that would differentiate the two Black male suspects from any other Black men in New Jersey. That vague description, quite frankly, was "descriptive of nothing." See Caldwell, 158 N.J. at 468 (Handler, J., concurring). If that description alone were sufficient

to allow police to conduct an investigatory stop of defendants' vehicle, then law enforcement officers would have been permitted to stop every Black man within a reasonable radius of the robbery. Such a generic description that encompasses each and every man belonging to a particular race cannot, without more, meet the constitutional threshold of individualized reasonable suspicion.

And the radio dispatch indicated that the store was robbed by two Black men. Sergeant Horan testified that upon seeing three Black males in the vehicle, he inferred that the third was the getaway driver. While Sergeant Horan's inference was reasonable, with the dearth of information available at the time regarding the suspects, it could easily be argued that police would have also been able to stop a single Black man in a car, or on foot, based on the assumption that the robbery suspects split up after the crime. The reality is that the ambiguous nature of the description could have resulted in Black men in any configuration and using any mode of transportation being stopped because the only descriptors of the suspects were race and sex.

Even Sergeant Horan testified that the only information he could confirm based on the initial report was the race and sex of the vehicle's occupants during the following exchange with the prosecutor:

> PROSECUTOR: And when you walked up, were you able to confirm any other part of the description in regard to the transmissions that you received from dispatch?
>
> SERGEANT HORAN: Other than all three occupants being male, Black and the clothing, there was nothing else to confirm.

Although Sergeant Horan mentioned the clothing, he testified that as he approached the vehicle after executing the stop, "[a]n officer at the scene relayed information that the suspects were wearing dark or black clothing or jackets." Information acquired after a stop cannot retroactively serve as the basis for the stop. For constitutional purposes, what matters is the information Horan possessed when he activated his overhead lights and pulled the car over. At that point, as discussed, he did not have a description of the clothing worn by the robbery suspects. He also did not know that the car had been reported stolen. All he knew was that the suspects were Black men.

That brings us to the other factors that the State argues contribute to a finding of reasonable suspicion based on the totality of the circumstances. Sergeant Horan testified that when he shined the spotlight on defendants' car and illuminated the interior, the three men did not react at all. He recalled that, as he observed defendants for a second or two, "[a]ll three heads remained straight ahead, focused on their path. No squinting, ducking,

shielding their eyes, which is, in my experience, uncommon." The State argued that Sergeant Horan's use of his patrol car's spotlight and defendants' behavior in response is critical to our analysis. The State even conceded at oral argument that without defendants' non-reaction to the spotlight, it would be very difficult to argue that reasonable suspicion existed prior to the stop.

As this Court and many other courts have recognized, nervous behavior or lack of eye contact with police cannot drive the reasonable suspicion analysis given the wide range of behavior exhibited by many different people for varying reasons while in the presence of police. See Rosario, 229 N.J. at 277. In some cases, a defendant's alarmed reaction is asserted as justification for a stop, but in other cases, a defendant's non-reaction is argued to form the basis for reasonable suspicion. See, e.g., United States v. Escamilla, 560 F.2d 1229, 1233 (5th Cir. 1977) (explaining that the defendants' decision not to "acknowledge the officers' presence" cannot play any role in reasonable suspicion, in part because it would conflict with the court's previous holding that repeated glances at officers were suspicious and "would put the officers in a classic 'heads I win, tails you lose' position"); cf. United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) (noting that law enforcement profiles of drug couriers have a "chameleon-like way of adapting to any particular set of observations" (quotation omitted)). In short, whatever

individuals may do -- whether they do nothing, something, or anything in between -- the behavior can be argued to be suspicious.

Thus, as with race and sex, a suspect's conduct can be a factor, but when the conduct in question is an ambiguous indicator of involvement in criminal activity and subject to many different interpretations, that conduct cannot alone form the basis for reasonable suspicion.

Even considering the closeness of Sergeant Horan's encounter with defendants in terms of spatial and temporal proximity to the robbery does not add significantly to the analysis of whether the stop was lawful. Horan was approximately three-quarters of a mile from the 7-Eleven when he spotted defendants' vehicle traveling away from the store and executed the stop. The record is unclear as to precisely when the robbery occurred. Sergeant Horan testified that he heard the radio dispatch regarding the robbery "just around midnight" or "a quarter after midnight" when dispatch indicated that the robbery "just happened." Horan then testified that he encountered defendants' vehicle approximately three minutes after receiving the dispatch.

The State argues that the timing of the robbery is clear because dispatch used the term "just" in describing when the robbery occurred. Certainly, at some point after the robbery someone in the 7-Eleven called 9-1-1, but we do not know when that was in relation to when the robbery occurred and when

dispatch alerted police. In this case, a matter of minutes makes a difference given the area in which the suspects could reasonably be expected to be after the commission of the robbery. Again, proximity in terms of time and place can certainly be factors in determining whether reasonable suspicion existed. On this record, however, where the 7-Eleven was located on a roadway close to a major interstate highway and the record is unclear as to when the robbery actually occurred, the asserted proximity in time and place is not sufficient to support the finding of reasonable suspicion.

Finally, we note that the non-specific and non-individualized factors asserted here do not add up to a totality of circumstances analysis upon which reasonable suspicion can be found. "Zero plus zero will always equal zero. To conclude otherwise is to lend significance to 'circumstances [which] describe a very large category of presumably innocent travelers' and subject them to 'virtually random seizures.'" State v. Morgan, 539 N.W.2d 887, 897 (Wis. 1995) (Abrahamson, J., dissenting) (alteration in original) (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980)).

In this case, Sergeant Horan, with his years of experience, had a hunch. That, however, is not the standard. The information Horan possessed did not amount to objectively reasonable and articulable suspicion, so the motion to suppress should have been granted.

VI.

For the foregoing reasons, the decision in State v. Nyema is affirmed. The decision in State v. Myers is reversed, Myers's conviction is vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES ALBIN, PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE PIERRE-LOUIS's opinion.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 084074 (A-67-19)

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **MIGUEL A. ROMAN-ROSADO,** Defendant-Appellant.	CRIMINAL ACTION On Appeal From The Final Judgment of the Superior Court of New Jersey, Appellate Division. Sat Below: Hon. Thomas W. Sumners, Jr., Hon. Richard J. Geiger, and Hon. Arnold L. Natali, Jr., J.J.A.D.

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Karen Thompson (#313662019)
Alexander Shalom
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1729
kthompson@aclu-nj.org

Counsel for Amicus Curiae

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PRELIMINARY STATEMENT

New Jersey's appellate court decisions have been unwavering about the principle that a search or arrest predicated on a mistake-of-law by a police officer renders that stop unconstitutional. In holding fast to this precept, New Jersey courts have made clear that suppressing evidence gathered from such a search serves as a foundational check on police error and misconduct, both protecting the Constitutional rights of the accused in each individual case and generally preventing future misconduct by police. The issues in the case now before this Court incriminate efforts to validate mistakes-of-law by officers and undermine this foundational check. This Court should not legitimize these efforts. The adoption of such a standard would subvert the rights of the individual, undermine scrutiny of police misconduct and the efforts to combat it, and provide judicial cover for officers who fail or refuse to learn the laws even through their work is, ontologically, about the knowing enforcement of laws. This case further exposes how traffic stops based on an officer's mistake-of-law can become deliberately abused tools used to justify arbitrary and discriminatory invasions into the privacy rights and bodily integrity of New Jerseyans, whether or not actual motor vehicle violations have, in fact, occurred. Both concerns demand reaffirmation of the rights of the accused in light of New Jersey's own long-standing jurisprudence and the current cultural moment.

As discussed further below, this Court should find that Officer Warrington's traffic stop of Mr. Roman-Rosado for an alleged violation of N.J.S.A. 39:3-33 was unreasonable and unconstitutional and led to the collection of tainted evidence which the lower court incorrectly failed to suppress. In this brief, the American Civil Liberties Union of New Jersey ("*Amicus"*) focuses on the unreasonable and unconstitutional nature of the stop. Even if this Court finds the stop to have been reasonable, *Amicus* also discusses why the United States Supreme Court's holding in Heien v. North Carolina, 574 U.S. 54 (2014) is inapplicable here and why this Court should decline to follow its edicts in line with New Jersey's longstanding and vigorous dedication to maintaining private individuals' constitutional protections. (Point I). *Amicus* then discusses the potential unconstitutionality of N.J.S.A. 39:3-33 and how the statute could never be the basis for a reasonable stop. *Amicus* examines how the use of legal vagueness in motor vehicle violations regulations—now potentially condoned with the viability of a Heien mistake-of-law excuse—are too often used as the basis for discriminatory and capricious traffic stop prosecution and to blur the lines between motor vehicle stops and criminal investigations under the guise of mistake-of-law. (Point II). Read collectively, these actions historically have and continue to disproportionately affect people of color, particularly Black people, leading to demonstrable harms to those communities and individuals, both psychically and/or physically.

This Court should reverse the lower court's findings and recommit to impeding the steady creep undermining the protections of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution by removing the abuse of power checks inherent in the exclusionary rule, and requiring accountability of law enforcement regarding their knowledge of the laws they are tasked with administering. Mistake-of-law defenses should not be allowed to infringe on the liberty of New Jerseyans, and the evidence gathered as the result of a mistake-of-law stop should be suppressed as fruit of the poisonous tree.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts and incorporates the statement of facts and procedural history contained within Defendant-Appellants' briefs in support of this appeal. This brief accompanies a Motion for Leave to Participate as Amicus Curiae. *R.* 1:13-9(e).

ARGUMENT

Law enforcement must be held to their obligations under both the State and Federal Constitutions; failure to do so would result in an infinite expansion of the legality of pretextual traffic stops, undermining the constitutional safeguards protecting New Jerseyans from invasion into their bodily integrity and privacy rights and the unconstrained threat of unreasonable searches and seizures.

I. OFFICER WARRINGTON'S TRAFFIC STOP OF MR. ROMAN-ROSADO WHILE DRIVING MS. WHITEHOUSE'S VEHICLE[1] WAS UNREASONABLE.

Under the Fourth and Fourteenth Amendments, an automobile can be stopped only when there is at least an articulable and reasonable suspicion that the motorist is unlicensed or an automobile unregistered, or that the vehicle or occupant is otherwise subject to seizure for violation of the law. Delaware v. Prouse, 440 U.S. 648, 663 (1979); see also Florida v. Royer, 460 U.S. 491, 497-99 (1983) (investigatory motor vehicle stop valid only if officer has articulable, reasonable basis for suspicion that offense has been or is being committed). Under Article I, par. 7 of the New Jersey Constitution, an investigatory stop of an automobile is valid only if the officer has a particularized suspicion based upon an objective observation that the person stopped has been or is about to engage in a violation of the code. State v. Davis, 104 N.J. 490, 504 (1986). Under both standards, particularized articulable and reasonable suspicion must be present to justify a stop and to meet an objective standard, evaluated in light of the totality of circumstances facing the officer making the stop. See Prouse, 440 U.S. at 654;

[1] As a preliminary matter, taken to its logical extension, Officer Warrington's interpretation of N.J.S.A. 39:3-33 places an untenable burden on defendants like Appellant-Defendant who do not own the car they were stopped in. If the car was borrowed, rented, or leased with a license frame identical to the one at issue here, a driver—even one lacking ownership status—would be liable for an infraction unless they exhibited huge amounts of effort to change the frame every time they got behind the wheel.

Davis, 104 N.J. at 504; see also State v. Carpentieri, 82 N.J. 546, 549 (1980) (expressly adopting Prouse standard).

Such constitutional protections exist to impose a standard of reasonableness on the exercise of discretion by government officials and to protect persons against arbitrary invasions into the constitutional guarantee. State v. Maristany, 133 N.J. 299, 304 (1993). Accordingly, the constitutionality of a search and seizure turns on whether the conduct of the law-enforcement officer who undertook the search was objectively reasonable. State v. Bruzzese, 94 N.J. 210, 217 (1983).

A. The State did not carry its burden to demonstrate the reasonableness of the motor-vehicle stop.

While the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules, to determine whether the development of suspicion was reasonable requires a totality of the circumstances evaluation, a clear-eyed look at the entire picture. Drake v. County of Essex, 275 N.J. Super. 585, 589-90 (App. Div. 1994). This is a complex analysis peculiarly dependent on the facts involved. State v. Zapata, 297 N.J. Super. 160, 171 (App. Div. 1997), quoting State v. Anderson, 198 N.J Super. 340, 348 (App. Div. 1985.). The State need not prove that the suspected motor-vehicle violation occurred, but the burden is on the State to prove the stop was lawful. State v. Locurto, 157 N.J. 463, 470 (1999); State v. Williamson, 138 N.J. 302, 304 (1994). While the evidentiary burden is considerably less than a preponderance of the evidence, it must be more

than a mere hunch. State v. Gamble, 218 N.J. 412, 428 (2014) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989), then quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

A mistake-of-law, however, should never be relevant in considering reasonableness. Where, as here, a police officer misunderstands what a law proscribes, his reliance on a mistaken view of the law is unreasonable and the stop violates Article I, Paragraph 7. Further, the unconstitutionality of the stop justifies the suppression of the seized evidence and ensures that officer error and wrongdoing remain unrewarded and that the spoiled fruits of the stop do not impede upon the rights of the accused. State v. Witt, 435 N.J. Super. 608, 615-616 (App. Div. 2014).[2]

1. *Officer Warrington failed to provide sufficient evidence that his suspicion was objectively reasonable.*

N.J.S.A. 39:3-33's essential purpose is to ensure that license plates are readable. See State v. Donis, 157 N.J. 44, 55 (1998) ("the very purpose of [N.J.S.A. 39:3-33] is to identify the owner of a car should the need arise from his or her license plate."[3]). As this Court has maintained for decades, "where a literal

[2] This Court later held that the Appellate Division erred in addressing the constitutionality of the stop because it had not been raised below. State v. Witt, 223 N.J. 409, 450 (2015). No such issue exists here.

[3] While Donis specifically examines the display of license plates, it cites to the entirety of N.J.S.A. 39:3-33 to discuss the issue, which indicates that each separate section of the statute is meant to assist in determining the identity of the owner or

interpretation will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control the letter." New Jersey Builders, Owners, & Managers Assn v. Blair, 60 N.J. 330, 338 (1972). "Statutory construction will not justly turn on literalism, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." Perrelli v. Pastorelle, 206 N.J. 193, 200 (2011) (citing Jersey City Chapter P.O.P.A. v. Jersey City, 55 N.J. 86, 100 (1969)). This is true both for the courts' interpretation of the law and for the law enforcement officers who are tasked with enforcing those laws. Using the letter of a motor vehicle law to unjustly gin up criminal investigations threatens to render Article I, Paragraph 7 purely academic, eliminating its spirit in its entirety. Where, as here, a literal construction produces results inconsistent with the overall purpose of the statute, that interpretation should be rejected. Hubbard v. Reed, 168 N.J. 387, 392-93 (2001) (citing Turner v. First Union Nat. Bank, 162 N.J. 75, 84 (1999)).

While Officer Warrington may have articulated his suspicion that Mr. Roman-Rosado violated N.J.S.A. 39:3-33, he failed to demonstrate how that suspicion was reasonable. Officer Warrington was well aware of the stated purpose

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status of the vehicle, not to implement aesthetic requirements entirely unrelated to an officer's ability to secure information.

of the statute; when asked directly about the function of a license plate, his answer was "[t]o be able to identify the car." T1 19:10.[4] This makes the stop all the more troubling and, indeed, all the more pretextual. Officer Warrington knew the purpose and spirit of the law, but chose instead to ignore that fundamental knowledge to make a stop that does not even support the mistake-of-law he relied upon for the stop.

For example, Officer Warrington testified that all of the letters and numbers making up the identifying information and the tag were clearly visible, allowing him to successfully identify the car. T1:15:4-23. He admitted that even with the bottom 10 percent of Garden State covered, the words were still legible, just less readable. T1 17:13-14. As such, there was never a concern about his ability to identify the car and the 10 percent covering of the Garden State motto fails to present an articulable public safety concern. See Witt, 435 N.J. Super at 616 n.8 ("such a holding—that what a police officer believes is abnormal constitutionally authorizes a stop or detention of a motorist otherwise operating his vehicle in a proper manner—would come dangerously close to suggesting that a police officer may stop an individual operating a motor vehicle at any time for any reason. We find that argument utterly foreign to well-established constitutional principles.") This is precisely why mistakes of law cannot provide an objectively reasonable

[4] T1 refers to the transcript of the October 18, 2017 Transcript of Plea Retraction.

basis to justify a stop. As the Appellate Division has explained, "[i]f officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." State v. Puzio, 379 N.J. Super 378, 384 (App. Div. 2005) (quoting United States v. Lopez-Soto, 205 F.3d 1101, 1105-06 (9th Cir. 2000)).

This is precisely what happened here. Given his awareness, the lower court's ruling deeming that a 10 percent plate obstruction was a N.J.S.A. 39:3-33 violation that permitted the stop allows the law to substitute Officer Warrington's hunch for an objectively grounded legal justification. Puzio, 379 N.J. Super. at 384 (quoting United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998). That is unconstitutional.

B. Even if the stop were objectively reasonable, which it is not, this Court should maintain its higher Article I, Paragraph 7 protections and reject the holding articulated in Heien.

Even if, however, the Court believes that the articulated suspicion was based on a reasonable mistake-of-law, this Court should decline to adopt the holding in Heien. A failure to do so would allow ignorance to override the essential legal knowledge required of law enforcement to correctly perform their duties and allow the use of that ignorance to justify the infringement of the constitutional rights of New Jerseyans.

1. *New Jersey's Appellate Courts have committed to safeguarding the Fourth Amendment and Article I, Paragraph 7 rights of New Jersey residents.*

In Heine, the Supreme Court transposed the mistake-of-law defense to the exclusionary rule context by expanding the good-faith exception into the realm of ignorance of law. Adopting the acceptability of a police officer's mistake-of-law as reasonable to justify a stop, however, would be to upend this Court's long-established rejection of the assertion of good faith belief as a substitute for reasonable suspicion. State v. Novembrino, 105 N.J. 95 (1987).

To this point, State v. Puzio remains instructive. In Puzio, the police officer mistakenly believed that the defendant was driving a commercial vehicle without a placard displaying the driver's name and business address, in violation of N.J.S.A. 39:4-46a, and stopped Puzio on that basis. Puzio, 379 N.J. Super. at 380. Passenger vehicles, like the car Puzio was driving, are exempt from the placard requirement. Puzio was nonetheless stopped and subsequently issued a summons for driving under the influence and a violation of N.J.S.A. 39:4-46a.

At trial, Puzio argued that evidence establishing his guilt of DUI should be suppressed because of the officers' mistaken belief that N.J.S.A. 39:4-46a had been violated, thus rendering the stop unlawful. Both the municipal court and Law Division denied the motion to suppress, determining that the officer's good faith belief that the statute was violated was enough to justify the stop. Puzio, 379 N.J.

Super. at 381. The Appellate Division reversed, concluding the stop was based on an entirely erroneous reading of the statute, id. at 382, and therefore no probable cause existed to justify it. Id. at 383. The Appellate Division noted that even under the good faith exception rejected in Novembrino, where an officer has an incorrect understanding of the law, the stop was unconstitutional and to hold otherwise would be to deride the basic protections of the Constitution:

> To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey.' If officers were permitted to stop vehicles where it is objectively determined that there is no legal basis for their action, 'the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive.' We cannot countenance an officer's interference with personal liberty based upon an entirely erroneous understanding of the law.
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> [Id. at 383-84 (internal citations omitted) (emphasis supplied); see also United States v. Lopez-Valdez, 178 F.3d 282, 289 (5th Cir. 1999).]

Under this Court's long-standing jurisprudence, New Jersey offers additional protections for its residents that do not allow such mistakes by law enforcement to serve as justification for illegitimate stops or for the use of evidence gathered during those stops. Indeed, this Court has prided itself on recognizing that its duty to protect New Jerseyans' Constitutional rights may outpace the Federal judiciary's interest in doing so: "although the United States Supreme Court may be a polestar

that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us." See e.g. State v. Hempele, 120 N.J. 182, 196 (1990). Further, the exclusionary rule is closely connected to the creation of procedural justice, which bolsters confidence in the administration of parity and equity and thus, in turn, reduces citizen complaints about policing.[5]

2. *This Court should not reward law enforcement for being ignorant of the law.*

For the private citizen, strong public policy maintains that ignorance of the law is no excuse. Recognizing that it is unrealistic to expect an individual to know every law and understand its complexities, statutory protections for a good faith defense based on ignorance of the law exist. N.J.S.A. 2C:2-4(c)3. However, to call on those protections, the private citizen must have first diligently tried "by all means available" to ascertain the meaning of the law. Id. Further, "the proof standard is by clear and convincing evidence" in circumstances in which a "law-

[5] David B. Rottman, Adhere to Procedural Fairness in the Justice System, 6 Crim. & Public Pol'y 835, 836 (2007) (quoting John D. McCloskey, Police Requests for Compliance: Coercive and Procedurally Just Tactics 91 (2003)); David Gray, Megan Cooper & David McAloon, The Supreme Court's Contemporary Silver Platter Doctrine, 91 Tex. L. Rev. 7, 14 (2012).

abiding and prudent person" would also so conclude. State v. Guice, 262 N.J. Super. 607, 616 (Law Div. 1993). Read together, the statute designates "a strong policy against permitting ignorance of the law as a justification, and place[s] a heavy burden on the defendant to prove his defense." Id. at 616-17.

It would be logically consistent, then, that law enforcement be held to an even higher standard than the layperson with regard to ignorance of the law. Through their training and experience, law enforcement officers are better situated to know the law; as their title axiomatically describes, their entire role is to enforce it. As the Supreme Court once noted:

> Generally state officials know something of the individual's basic legal rights. If they do not, they should, for they assume that duty when they assume their office. Ignorance of the law is no excuse for men in general. It is less an excuse for men whose special duty is to apply it, and therefore to know and observe it. If their knowledge is not comprehensive, state officials know or should know when they pass the limits of their authority, so far at any rate that their action exceeds honest error of judgment and amounts to abuse of their office and its function. When they enter such a domain in dealing with the citizen's rights, they should do so at their peril, whether that be created by state or federal law.
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> [Screws v. United States, 325 U.S. 91, 129-30 (1945) (emphasis added).]

Adopting Heien would allow officers to claim "justified" ignorance of the law while enforcing absurdist applications to it that shrink an individual's rights to self-determination and debase their constitutional rights. An adoption of Heien would

also disincentivize officers from learning about the law in a way that would help inform the accurate performance of their duties. Heine's approval of police ignorance as justification to avoid suppression of evidence provides no motivation for officers to truly know the law; rather, it provides wide berth for law enforcement officers to retrofit farcical interpretations of law into a mistake-of-law defense.

3. *Adoption of Heine would contradict the rule of lenity.*

Where a statute has both criminal and noncriminal applications, the rule of lenity applies. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004). Given that Title 39 motor vehicle laws are, by definition, quasi-criminal in nature, and persons prosecuted under Title 39 are entitled to the same protections as criminal defendants, (see State v. Toussaint, 440 N.J. Super. 526, 535 (App. Div. 2015) (citing State v. Widmaier, 157 N.J. 475, 494 (1999))), even if Officer Warrington's interpretation of N.J.S.A. 39:3-33 was deemed reasonable, it should have been rejected because such overly expansive readings are typically precluded by the rule of lenity, which generally requires interpreters to "strictly construe" ambiguity in criminal laws against the State and in favor of defendants. See State v. Crawley, 187 N.J. 440, 463 (2006); see United States v. Valle, 807 F.3d 508, 523 (2d Cir. 2015) (The rule of lenity ensures that criminal statutes will . . . minimize . . . the

risk of selective or arbitrary enforcement, and strikes the appropriate balance between the legislature and the court in defining criminal liability.).

Such strictness ensures that unlimited discretion by police officers to, as Officer Warrington put it, "try and develop criminal investigations" (T1 14:13-16) is not assisted by inexact legislative drafting and contorted interpretations of the law. Indeed, "[s]tatutes frequently . . . require some effort to connect the dots. If reasonable mistakes of law were permitted on this basis alone (without showing concomitant ambiguity), virtually no mistakes of law would be unreasonable, given the often dense and inartful structure of such statutes, writ large." Flint v. Milwaukee, 91 F.Supp. 3d 1032, 1059 (E.D. Wi. 2015).

That is most certainly demonstrated here where the Legislature has tried, multiple times, to clarify and amend the statute by expressly stating that no violation has occurred where the license frame is not obscuring identifying information. Indeed, the Legislature has introduced several bills to amend N.J.S.A. 39:3-33 in an effort to make explicit its statutory purpose in response to concerns around the number of tickets issued for alleged license frame infractions. See A. 1531 (2020) ("[n]o person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures the numbers or letters of the registration certificate of the vehicle imprinted upon the vehicles registration plate or identifying information set forth on any insert . . .")

(emphasis added); A. 5079 (2018) (same); A. 4631 (2018) ("this provision shall not apply to any license plate frame or identification marker holder provided that the frame or holder does not conceal, obscure, or in any way encroach upon the registration numbers and letters set forth on the motor vehicles license plates.") (emphasis added); A. 4099 (2020) (amending so that the provision is inapplicable "to any license place frame or identification marker holder that has been issued to a motor vehicle owner . . . by a dealer authorized to engage in the business of buying, selling, or dealing in motor vehicles in this state . . . provided that the frame or holder does not conceal, obscure, or in any way encroach upon the registration numbers and letters set forth on the motor vehicles license plates."); A. 2136 (2018) (same); see also Larry Higgs, Nearly 120K people received a ticket last year for this common license plate violation, NJ.com (Apr. 10, 2018), https://www.nj.com/traffic/2018/04/your_personalized_piece_of_plastic_could_get_you_a.html.

Adopting Heine, under these facts, would, effectively, grant the rule of lenity to Officer Warrington, and not to Mr. Roman-Rosado, by ignoring the clear rationale behind the statute and construing N.J.S.A. 39:3-33 in the officer's favor. In this instance, Officer Warrington was not only admittedly clear about the purpose of N.J.S.A. 39:3-33, but the Legislature is aware that officers are using the ambiguity to enforce pretextual stops. Providing judicial sanction to this sort of

behavior by adopting Heine's "oh well it happens sometimes" mistake-of-law defense pooh poohs the real and adverse effects these sorts of policies have on the lives of New Jersey residents. Pretextual stops are not mistakes, and, as discussed in greater detail *infra*, pretextual stops cost lives, particularly Black and Brown ones.

II. N.J.S.A. 39:3-33 IS VOID FOR VAGUENESS BECAUSE THE OVERBROAD LANGUAGE AROUND LICENSE PLATE FRAMES ENCOURAGES ARBITRARY AND DISCRIMINATORY APPLICATION BY LAW ENFORCEMENT.

N.J.S.A. 39:3-33 reads in pertinent part:

> No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate or any part of any insert which the director, as hereinafter provided, issues to be inserted in and attached to that registration plate or marker.

A law is void as a matter of due process if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983). New Jersey courts will, when possible, adopt legal interpretations that avoid constitutional infirmity. N.J.S.A. 39:3-33, however, uses language so overinclusive and vague that it threatens due process by materially impacting the rights of New Jersey citizens to be free from unreasonable searches and seizures under the Fourth Amendment and Article I, Paragraph 7 of the Federal and State constitutions.

Indeed, using N.J.S.A. 39:3-33, Officer Warrington stopped Mr. Roman-Rosado for a violation of the statute although nothing about the plate frame impeded the officer's ability to identify the car or read the license plate, and only 10 percent of the writing on the bottom edge of the plate—which is changeable and without legal meaning—was obscured. See Da027-031.

Vagueness is a procedural due process concept grounded in notions of fair play. State v. Lashinsky, 81 N.J. 1, 17 (1979). A basic element of the rule of law is that a person must be able to know beforehand, with some reasonable degree of certainty, whether or not a particular act will violate the law. "A legislative act, whether a statute or ordinance, must not be so vague that a person of ordinary intelligence is unable to discern what it requires, prohibits, or punishes." Brown v. Newark, 113 N.J. 565, 572-73 (1989). N.J.S.A. 39:3-33 is written so broadly it criminalizes what is, essentially, an aesthetic choice unrelated to public safety. It is unclear if one would receive a ticket for covering one percent, four percent or 10 percent of a plate with a frame, and it is also unclear if the majority of people with license frames that cover any fraction of a plate are repeatedly ticketed for the infraction. Accordingly, to survive a "vagueness" challenge:

> 'The vagueness test' demands that a law be sufficiently clear and precise so that people are given notice and adequate warning of the law's reach. A penal statute should not become a trip for a person of ordinary intelligence acting in good faith, but rather should give fair notice of conduct that is forbidden.
>
> A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary.
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> [Brown, 113 NJ at 577 (emphasis supplied).]

It is clear from the circumstances of the instant case that the vagaries written into the statute are used with the specific purpose of "stop[ping] a lot of cars for motor vehicle infractions . . . [to] then try and develop criminal investigations . . ." 1T 14:9-19. Nothing about the words at the top or bottom of the plate assist law enforcement in identifying the vehicle's owner or with public safety, yet in 2017, nearly 120,000 New Jerseyans—a little over 1 percent of the State's population—received a ticket for license frames covering the slightest part of the plate.[6]

[6] This percentage may still have an outsized impact on communities of color as New Jersey enjoys the dubious distinction of having some of the highest racial disparities in the criminal legal system, including incarceration in its prisons and in the use of force from its police officers. Disha Raychaudhuri & Stephen Stirling, Black people in N.J. say they're more likely to be punched, kicked by cops. Now, data backs that up, NJ.com (Dec. 17, 2018, last updated Sep. 24, 2019), https://www.nj.com/news/erry-2018/12/69f209781a9479/black-people-in-nj-say-theyre.html. Discrepancies in traffic stops in the state—from the stops themselves to the treatment of the motorist by the officers—show similar disparities, an issue playing out within the state and nationwide. Jennifer Eberhardt, et al., "Language from police body camera footage shows racial disparities in officer respect," Proceedings of the National Academy of Sciences, Jun 2017, 114 (25) 6521-6526,

This, despite the fact that residents with a license plate in New Jersey and the law enforcement officers who make motor vehicle stops, know the words "Garden State" adorn the bottom of the vast majority of New Jersey licenses. T1 17:15-18 ("Q: But you could still clearly see that it was Garden State, the words, correct? A: Yeah, through familiarity of the license plate, yeah. I could see that it said Garden State.").

N.J.S.A. 39:3-33 has been used to subject New Jerseyans to the virtually unlimited discretion of the police, to whom the statute gives no guidance. Accordingly, N.J.S.A. 39:3-33 violates the guarantees of constitutional due process under Due Process Clauses of the United States Constitution and the New Jersey Constitution.

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available at https://www.pnas.org/content/114/25/6521; James E. Lange, Kenneth O. Blackman, and Mark B. Johnson, Speed Violation Survey of the New Jersey Turnpike: Final Report, submitted to the Office of the Attorney General of New Jersey 2001; National Institutes of Justice, Racial Profiling and Traffic Stops (Jan. 9, 2013), available at https://nij.ojp.gov/topics/articles/racial-profiling-and-traffic-stops; Sharon LaFraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, N.Y. Times (Oct. 24, 2015), https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html ("As the public's most common encounter with law enforcement, [traffic stops] largely shape perceptions of the police. Indeed, complaints about traffic-law enforcement are at the root of many accusations that some police departments engage in racial profiling. Since Ferguson erupted in protests in August last year, three of the deaths of African-Americans that have roiled the nation occurred after drivers were pulled over for minor traffic infractions: a broken brake light, a missing front license plate and failure to signal a lane change.")

A. The vagueness of N.J.SA. 39:3-33 encourages and gives sanction to capricious and discriminatory stops by law enforcement that disproportionately affect people of color.

The Supreme Court has long held that it is reasonable, legal, and harmless for police to use minor pretextual traffic stops to "fish" for evidence of a larger criminal enterprise. Whren v. United States, 517 U.S. 806 (1996).

In Whren, while patrolling a "high drug area," an officer noticed two young Black occupants in a dark Pathfinder truck. Whren, 517 U.S. at 808. The young men aroused the officer's suspicion simply because the driver was looking at the passenger's lap while waiting at a stop sign. Id. After the truck stopped at the stop sign for "an unusually long time—more than 20 seconds," the officer turned back to follow the truck. Id. The truck turned without signaling. Id. While stopping the truck to give a warning about the traffic violations, the officer stated he saw bags of drugs in the car. Id. at 809. While the officer's observations of where the driver was looking provided no understanding of how looking into the passenger's la created reasonable suspicion of criminal activity, the Court rejected the defendant's argument about the officer's reasonableness in conducting the stop.

However, significant social research shows that these "pretextual" traffic stops—stops that are purportedly legitimated by traffic or vehicle infractions that are often without reasonable suspicion or probable cause—result in disparate impact on communities by race, providing cover to effectuate discriminatory traffic

stops with the imprimatur of the State. Accordingly, this Court should consider how upholding a purported "mistake-of-law" by a police officer based on an unconstitutionally vague law can impact and sustain the continued subjugation of Black and Brown New Jerseyans who are routinely subjected to unjustified pretextual stops every day.

Pretextual stops in the United States generally and in New Jersey in particular, are fraught with racial bias and discrimination.[7] See infra at n.4. Both anecdotal and quantitative data show that nationwide, the police wield the discretionary power of the pretextual stop primarily against African Americans and Latinx populations.[8]

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[7] David Kocieniewski, Study Suggests Racial Gap In Speeding In New Jersey, N.Y. Times (Mar. 21, 2002), https://www.nytimes.com/2002/03/21/nyregion/study-suggests-racial-gap-in-speeding-in-new-jersey.html.

[8] See also Jaeah Leejul, We Crunched the Numbers on Race and Traffic Stops in the County Where Sandra Bland Died, Mother Jones (Jul. 24, 2015), http://www.motherjones.com/politics/2015/07/traffic-stops-black-people-waller-county (studying traffic stop rates in Texas); Sharon Lafraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, ("And black motorists who were stopped were let go with no police action—not even a warning—more often than were whites. Criminal justice experts say that raises questions about why they were pulled over at all and can indicate racial profiling."); Frank R. Baumgartner, Derek Epp, & Kelsey Shoub, Analysis of Black-White Differences in Traffic Stops and Searches in Roanoke Rapids, NC, 2002-2013, available at https://www.unc.edu/~fbaum/TrafficStops/Reports2014/RoanokeRapidsTrafficStopsBaumgartner-4October2014.pdf (concluding that a thirteen-year study of traffic stops in North Carolina revealed disproportionate number of non-whites being

For example, the Stanford Open Policing Project—a partnership between the Stanford Computational Journalism Lab and the Stanford Computational Policy Lab—has, to date, collected and standardized over 200 million records of traffic stop and search data from around the country. The study of those records concluded that "relative to their share of the residential population, we find that black drivers are, on average, stopped more often than whites." See Emma Pierson, et al., A large-scale analysis of racial disparities in police stops across the United States, Nature Human Behavior, available at https://doi.org/10.1038/s41562-020-0858-1. Similarly, in one report submitted to the New Jersey Attorney General, among individuals who were subjected to traffic stops in New Jersey, 77.2 percent were Black or Latinx.[9] As recently as May of this year, however, an audit

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stopped and search); Lauren Kirchner, The Racial Imbalance In Traffic Stops Persists, Pacific Standard (Apr.16, 2015), https://psmag.com/news/the-racial-imbalance-in-traffic-stops-persists (reporting on results of study by Baumgartner et. al); University of Vermont, Analysis of Traffic Stops and Outcomes in Vermont Shows Racial Disparities (Jul. 1, 2006) (concluding after a five-year study that police disproportionately stop black drivers); David Montgomery, Data Dive: Racial Disparities in Minnesota Traffic Stops, Pioneer Press, (Jul. 9, 2016), http://www.twincities.com/2016/07/08/data-dive-racial-disparities-in-minnesota-trafficstops/ (reporting on racial disparity in 2003 in Minnesota traffic stops); Greensboro Police Department, Eleazer Hunt, Karen Jackson, Jan Rychtar, & Rahul Singh, Analysis of Traffic Stop and Search Data, available at http://www.greensboronc.gov/modules/showdocument.aspx?documentid=30373; Press Release, RTI International, Black Male Drivers Disproportionately Pulled Over in Traffic Stops by Durham Police Department, Study Finds, available at https://durhamnc.gov/DocumentCenter/View/9593.

[9] N.J. Att'y Gen., Interim Report of the State Review Team Regarding Allegation of Racial Profiling, 26 (1999), available at

conducted by the New Jersey Comptroller's office noted that New Jersey State Police are still failing to keep accurate data on these racial imbalances.[10]

Indeed:

> [P]olice stops . . . divide Americans into two groups. On the one side are people for whom police stops are the signal form of surveillance and legal racial subordination. This group is populated largely by African Americans and other racial minorities. On the other side are people for whom police stops are annoyances that, at worst, yield expensive traffic tickets, but which also reaffirm the driver's place as a full citizen in a rule-regulated society. This group is populated largely by whites.[11]

Where that first group drives, a police officer can stop a driver for any reason, or none at all.[12] The hard truth that the current moment has laid bare is that no person

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https://www.state.nj.us/lps/intm_419.pdf. Nearly ten years later, the New Jersey Attorney General's office, with the assistance of the Office of Law Enforcement Professional Standards, issued another report regarding police traffic Enforcement Activities. Plate and registration infractions by Black motorists make up nearly a quarter of moving violation stops, which is alarming given that Black people make up just over 13% of New Jersey's population. N.J. Att'y Gen., Aggregate Report of Traffic Enforcement Activities of the New Jersey Police (Aug. 2018), available at https://www.nj.gov/oag/oleps/pdfs/OLEPS-2018-Fifteenth-Aggregate-Report_TEA_njsp.pdf.

[10] Blake Nelson, N.J. State Police must improve tracking possible racial profiling in traffic stops, audit says, (May 15, 2020), NJ.com, https://www.nj.com/news/2020/05/nj-state-police-must-improve-tracking-possible-racial-profiling-in-traffic-stops-audit-says.html.

[11] Charles R. Epp, Steven Maynard-Moody & Donald P. Haider-Markel, Pulled Over: How Police Stops Define Race and Citizenship, 150 (John M. Conley & Lynn Mather eds., 2014) (hereinafter, Epp, Pulled Over).

[12] "[W]ith the traffic code in hand, any officer can stop any driver any time." David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme

of color is safe from this treatment anywhere, regardless of their obedience to the law, their age, the type of car they drive, or their station in life; drivers of color are simply more likely to be subjected to investigatory, discretionary stops because of their race.[13] What is more, these stops can have dire consequences. Instead of getting a ticket that merely ruins their day, a person of color stopped on the road may get a bullet that takes their life. The deaths of Philando Castile, Matthew Allen, Samuel DeBose and Walter Scott bear witness to this reality.[14]

This Court should make clear that the Constitution does not support these unjust and disparate outcomes. For decades, courts have recognized the potential for Whren and the good-faith exception to facilitate pretextual stops. As the Fifth Circuit posited over twenty years ago, "[u]nder the general rule established in

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Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 559 (1997) (internal punctuation omitted).

[13] Epp, Pulled Over, 72-73, 155 (2014)

[14] Jamiles Lartey & Jon Swaine, Philando Castile shooting: officer said he felt in danger after smelling pot in car (June 20, 2017), https://www.theguardian.com/us-news/2017/jun/20/philando-castile-shooting-marijuana-car-dashcam-footage; Matthew Allen, Family seeks answers in shooting death of unarmed Black man during routine traffic stop, (June 7, 2020), https://thegrio.com/2020/06/07/nj-state-trooper-kills-unarmed-black-man/; Associated Press, Samuel DuBose shooting: second mistrial declared in officer's murder trial (June 23, 2017), https://www.theguardian.com/us-news/2017/jun/23/samuel-dubose-shooting-ray-tensing-trial-mistrial; Michael S. Schmidt & Matt Apuzzo, South Carolina Officer Is Charged With Murder of Walter Scott (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html.

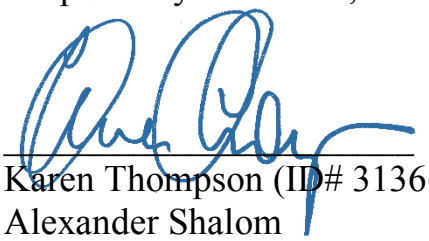
Whren, a traffic infraction can justify a stop even where the police officer made the stop for a reason other than the occurrence of the traffic infraction. But if the officers are allowed to stop vehicles based upon their subjective belief that traffic laws have been violated even where no such violation has, in fact, occurred, the potential for abuse of traffic infractions as pretext for effecting stops seems boundless and the costs to privacy rights excessive." Lopez-Valdez, 178 F.3d at 289.

That is precisely the situation presented here, but now with the potentially new shelter of mistake-of-law. As society can no longer ignore the injustices such rules create, neither can this Court. By allowing law enforcement to use N.J.S.A. 39:3-33 to create a generalized reasonable suspicion, there is no basis upon which a person of color can actively refute racial animus or bias. Even if there is some indication that the officer's subjectivity was informed by racism, the vagueness of the statute can be deployed as a shield as surely as it has already been deployed as a sword, and allow in tainted evidence.

CONCLUSION

For all these reasons, and in consideration of the profound effect this holding will have on the lives and well-being of Black and brown New Jerseyans, *Amicus* ask the court to reverse the lower court's decision, find that Officer Warrington's stop of Mr. Roman-Rosado was unreasonable, and suppress the evidence gathered as a result of that stop. Should this Court find that the stop was, in fact, reasonable based on N.J.S.A. 39:3-33, *Amicus* also asks the court to decline to adopt Heine's holding.

Respectfully submitted,



Karen Thompson (ID# 313662019)
Alexander Shalom
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1729

Dated: August 5, 2020

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of an opinion may not have been summarized.

State v. Darius J. Carter (A-66-19) (083221)
State v. Miguel A. Roman-Rosado (A-67-19) (084074)

Argued April 27, 2021 -- Decided August 2, 2021

RABNER, C.J., writing for a unanimous Court.

In recent years, more than 100,000 drivers annually have been ticketed for violating N.J.S.A. 39:3-33 (section 33), which includes a prohibition against "driv[ing] a motor vehicle which has a license plate frame . . . that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate." The defendants in these consolidated appeals were stopped while driving. The stops were pretextual: officers stopped each defendant because part of their license plates were covered, but the purpose was to try to develop a criminal investigation. The police found contraband in both cases, which formed the grounds for defendants' convictions.

Defendants argue that if section 33 is read expansively, the statute is unconstitutionally vague and overly broad, and also invites discriminatory enforcement. The State opposes those arguments and relies in the alternative on Heien v. North Carolina, 574 U.S. 54 (2014), for the proposition that a stop and conviction based on an officer's reasonable but mistaken interpretation of the law should be upheld.

Defendant Darius Carter was stopped in September 2014. The words "Garden State" were covered on his car's license plate, and the basis for the stop was a suspected violation of section 33. Carter was driving without a license, and the police learned that he had two outstanding arrest warrants. The police arrested Carter and later found heroin and a small amount of cocaine on him. Carter moved to suppress the drugs seized. The parties did not dispute that a license plate frame covered the words "Garden State" on the plate, and neither party argued that any other part of the plate was covered.

The trial court denied the motion to suppress, concluding the stop was pretextual but that the law unambiguously barred concealing any markings on a license plate, not just the plate's registration numbers. The Appellate Division affirmed, finding that the statute's plain language "expressly prohibits even the partial concealment of any marking on the license plate," including the words "Garden State."

In April 2016, a police officer stopped the car Miguel Roman-Rosado was driving. The officer testified he "was on a proactive detail" -- "stop[ping] a lot of cars for motor vehicle infractions and . . . then try[ing to] develop criminal investigations from that." While driving right behind Roman-Rosado, the officer noticed a bracket around the rear license plate that covered about ten or fifteen percent of the words "Garden State." The officer stopped the car based on a suspected violation of section 33 and learned that Roman-Rosado had two outstanding arrest warrants. After spotting a garment wrapped around something bulky, the officer found an unloaded handgun. Roman-Rosado moved to suppress the gun as the fruit of an unlawful stop.

The trial court denied the motion. The court acknowledged there were minimal obstructions on the plate -- a portion of the bottom of "Garden State" as well as the top of the "N" and the "J" in New Jersey -- but found that the statute barred the "obstruction of any marking on the" plate. The Appellate Division reversed, finding that the plate's markings were not concealed or obscured within the meaning of the statute. 462 N.J. Super. 183, 190 (App. Div. 2020). The court found that there was no reasonable basis for the police to stop Roman-Rosado's car, that the subsequent search of the car was unconstitutional, and that the handgun should have been suppressed. Id. at 199-200.

The Court granted certification. 241 N.J. 498 (2020); 241 N.J. 501 (2020).

HELD: *To avoid serious constitutional concerns, the Court interprets the statute narrowly and holds that N.J.S.A. 39:3-33 requires that all markings on a license plate be legible or identifiable. If a frame conceals or obscures a marking in a way that it cannot reasonably be identified or discerned, the driver would be in violation of the law. In practice, if a registration letter or number is not legible, the statute would apply; but if a phrase like "Garden State" is partly covered but still recognizable, there would be no violation.

*Under that standard, defendant Darius Carter's license plate frame, which covered the phrase "Garden State" entirely, violated the law, so the stop was lawful. In contrast, defendant Miguel Roman-Rosado's plate frame did not cover "Garden State." It partially covered only ten or fifteen percent of the slogan, which was still fully legible, so the stop was unlawful.

*The Court declines to adopt the standard set forth in Heien under the New Jersey Constitution. The State Constitution is designed to protect individual rights, and it provides greater protection against unreasonable searches and seizures than the Fourth Amendment. Under Article I, Paragraph 7 of the State Constitution, it is simply not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute. Because there was no lawful basis to stop Roman-Rosado, evidence seized as a direct result of the stop must be suppressed.

1. The Court reviews the text of section 33 and notes that violations of that section carry a fine and imprisonment for failure to pay the fine. A related provision in Title 39 requires that the words "Garden State" "be imprinted" on license plates for passenger cars. N.J.S.A. 39:3-33.2. Yet other statutes authorize specialty plates, which do not contain the phrase "Garden State." A companion statute to section 33 addresses groups that supply license plate frames or holders and prohibits the distribution of merchandise "knowing that such merchandise is designed or intended to be used to conceal or degrade the legibility of any part of any marking imprinted upon a vehicle's license plate for the purpose of evading law enforcement." N.J.S.A. 39:3-33c (section 33c). The police issue more than 100,000 violation notices for section 33 in a year. Not a single violation notice was issued for section 33c from 2012 to 2019. (pp. 15-17)

2. The Court reviews principles of statutory construction and the parties' arguments about the meaning of section 33. The State contends that the statute's words are clear: a license plate frame cannot cover any part of any marking on a license plate. Defendants stress that section 33 bars the use of license plate frames only insofar as they conceal or otherwise obscure certain markings. The Court notes first that the term "marking" in section 33 extends to any impressions on a license plate, not just the registration numbers and letters. But, after reviewing the ordinary definitions of the key terms of section 33 -- "conceal" and "obscure" -- the Court understands those terms to focus on legibility, not on every minor covering of otherwise recognizable markings. Reading the statute in that way avoids absurd results and comports with the view that the Legislature "writes motor-vehicle laws in language that can be easily grasped by the public so that every motorist can obey the rules of the road." State v. Scriven, 226 N.J. 20, 34 (2016). (pp. 17-22)

3. Noting that section 33 -- unlike section 33c -- does not expressly include language about legibility, the Court considers the statute's legislative history. That history sheds little light on the scope of the provision at issue here or the meaning of its key terms, but amendments to other portions of N.J.S.A. 39:3-33 reflect the Legislature's concern about the legibility of license plates. (pp. 22-24)

4. Defendants argue that a broad reading of section 33 does not pass constitutional muster. They argue that a law that criminalizes de minimis obstructions of phrases like "Garden State" fails under the permissive rational basis test. They contend as well that the statute, as interpreted by the State, is both unconstitutionally vague and overly broad. Vague laws are constitutionally deficient under principles of procedural due process because they leave people guessing about their meaning and do not provide fair notice of conduct that is forbidden. Overly broad statutes suffer from a different flaw, one that rests on principles of substantive due process: they invite excessive governmental intrusion into protected areas by extending too far. Rather than strike down a law as unconstitutional, however, if the "statute is 'reasonably susceptible' to an interpretation that will render it constitutional," courts construe the law narrowly to remove any doubts about its constitutional validity. State v. Burkert, 231 N.J. 257, 277 (2017). (pp. 24-26)

5. The Court agrees that section 33, if read broadly, raises serious constitutional concerns. Roman-Rosado was stopped for a license plate frame that covered ten to fifteen percent of the bottom of the phrase "Garden State." But the words, like the rest of the markings on the plate, were fully recognizable. Most people would have no idea that section 33 might apply in such a situation. If the proposed broad reading of section 33 were the standard, tens if not hundreds of thousands of New Jersey drivers would be in violation of the law. Further, limitless discretion can invite pretextual stops, like the stops in both cases here. It can also lead to arbitrary and discriminatory enforcement. It is cause for concern, as well, that despite the State's frequent use of section 33 to stop drivers, no summonses were issued under section 33c from 2012 through 2019. Law enforcement commonly attacks problems at their source, yet here, rather than take any action against the source of the offending frames, motorists by the thousands are pulled over each year. To the extent section 33 has two meanings -- a narrow one that focuses on whether a license plate is legible, and a broader one that raises serious constitutional issues -- the doctrine of constitutional avoidance calls for a narrow interpretation. State v. Pomianek, 221 N.J. 66, 90-91 (2015). (pp. 26-29)

6. The Court holds that section 33 requires that all markings on a license plate be legible or identifiable. That interpretation is consistent with the plain meaning of the statute's wording. If a license plate frame or holder conceals or obscures a marking such that a person cannot reasonably identify or discern the imprinted information, the driver would be in violation of the law. In other words, a frame cannot cover any of the plate's features to the point that a person cannot reasonably identify a marking. So, for example, if even a part of a single registration letter or number on a license plate is covered and not legible, the statute would apply because each of those characters is a separate marking. If "Garden State," "New Jersey," or some other phrase is covered to the point that the phrase cannot be identified, the law would likewise apply. But if those phrases were partly covered yet still recognizable, there would be no violation. When applying the above test, trial courts will be asked to evaluate whether license plate markings are legible or identifiable from the perspective of an objectively reasonable person. That judgment can be based on still photos or videos. (pp. 29-30)

7. Applying the above test here, Roman-Rosado did not violate the statute. In Carter's case, however, it is undisputed that "Garden State" was entirely covered. As a result, the plate violated the statute, and law enforcement officers had the right to stop Carter. The Court does not find persuasive Carter's argument that the statute violated his rights under the First Amendment by requiring him to display the state motto, "Garden State." The case on which Carter bases his argument, Wooley v. Maynard, involved two components: (1) compelled speech by the government; and (2) content a party disagreed with. See 430 U.S. 705, 715 (1977). Unlike in Wooley, the record before this Court does not include any statement or certification that Carter disagrees with the expression "Garden State" or finds it "morally objectionable." See ibid. (pp. 30-33)

8. Because Roman-Rosado did not violate the statute, the Court evaluates the reasonable mistake of law doctrine. The Fourth Amendment and Article I, Paragraph 7 of the State Constitution guarantee individuals the right to be free from unreasonable searches and seizures. A motor-vehicle stop by the police constitutes a seizure and requires reasonable and articulable suspicion that the driver is committing a motor-vehicle violation or some other offense. The sole basis for Roman-Rosado's stop was his alleged violation of section 33. But, for reasons explained in the Court's ruling, he did not violate the law. The State relies on the United States Supreme Court's holding in Heien, which it asks the Court to adopt. In Heien, the Supreme Court held that a police officer's mistake of law can give rise to the reasonable suspicion needed to justify a traffic stop under the Fourth Amendment. 574 U.S. at 57. The Court reviews Heien in detail. (pp. 33-39)

9. The United States Supreme Court is the final arbiter of the Federal Constitution. Here, the Court considers whether the reasonable mistake of law doctrine comports with the State Constitution. In our federalist system, state constitutions can be a source of more expansive individual liberties than what the Federal Constitution confers. On a number of occasions, the Court has found that the New Jersey Constitution affords greater protection against unreasonable searches and seizures than the Fourth Amendment does. In State v. Novembrino, for example, the Court declined to adopt the good faith exception to the exclusionary rule established under federal law in United States v. Leon, 468 U.S. 897 (1984). See 105 N.J. 95, 157-58 (1987). (pp. 39-43)

10. The State Constitution favors the protection of individual rights and is designed to vindicate them. The key issue under New Jersey's Constitution is not whether an officer reasonably erred about the meaning of a law. It is whether a person's rights have been violated. If a law does not establish an offense, the reasonable nature of an officer's mistake cannot transform an officer's error into reasonable suspicion that a crime has been committed. If officers could search and seize a person under those circumstances, reasonable, good faith errors would erode individual rights that the State Constitution guarantees. Although officers may need to make difficult judgment calls when enforcing laws that are not entirely clear, they suffer no penalty if they make a reasonable mistake. That cannot be said of individuals who are stopped or searched based on a mistaken interpretation of the law. They cannot tailor their behavior in advance to abide by what an officer might reasonably, but mistakenly, believe the law says. And if they are then stopped -- without notice -- for conduct that no law proscribes, they suffer real harm. The Court declines to adopt a reasonable mistake of law exception under the New Jersey Constitution. The seizure of the handgun in Roman-Rosado's case -- following an unjustified car stop -- must be suppressed under the exclusionary rule. (pp. 43-46)

AFFIRMED AS MODIFIED in both cases.

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

SUPREME COURT OF NEW JERSEY

A-66 September Term 2019

A-67 September Term 2019

083221 and 084074

State of New Jersey,

Plaintiff-Respondent,

v.

Darius J. Carter, a/k/a
Buddah Buddah, and
Buddha J. Carter,

Defendant-Appellant.

State of New Jersey,

Plaintiff-Appellant,

v.

Miguel A. Roman-Rosado, a/k/a
Miguel Roman, Damian Rosado,
Miguel A. Roman, and
Miguel A. Rosado,

Defendant-Respondent.

State v. Darius J. Carter (A-66-19): On certification to the Superior Court, Appellate Division.

State v. Miguel A. Roman-Rosado (A-67-19): On certification to the Superior Court, Appellate Division, whose opinion is reported at 462 N.J. Super. 183 (App. Div. 2020).

Argued	Decided
April 27, 2021	August 2, 2021

Regina M. Oberholzer, Deputy Attorney General, argued the cause for appellant in State v. Miguel A. Roman-Rosado (A-67-19) and argued the cause for respondent in State v. Darius J. Carter (A-66-19) (Andrew J. Bruck, Acting Attorney General, attorney; Regina M. Oberholzer, of counsel and on the briefs, and Nicole Handy, Assistant Burlington County Prosecutor, on the briefs).

Alison Perrone, First Assistant Deputy Public Defender, argued the cause for respondent in State v. Miguel A. Roman-Rosado (A-67-19) (Joseph E. Krakora, Public Defender, attorney; Emma R. Moore, Assistant Deputy Public Defender, of counsel and on the briefs).

Joseph J. Russo, Deputy Public Defender, argued the cause for appellant in State v. Darius J. Carter (A-66-19) (Joseph E. Krakora, Public Defender, attorney; Joseph J. Russo and Emma R. Moore, Assistant Deputy Public Defender, of counsel and on the briefs, and Amira R. Scurato, Designated Counsel, on the briefs).

Karen Thompson argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation, attorneys; Karen Thompson, Alexander Shalom, and Jeanne LoCicero, on the briefs).

CJ Griffin argued the cause for amicus curiae Latino Leadership Alliance of New Jersey (Pashman Stein Walder Hayden, attorneys; CJ Griffin, of counsel and on the briefs).

CHIEF JUSTICE RABNER delivered the opinion of the Court.

Walk through any crowded parking lot and look carefully at the license plates. Many if not most of them have frames that cover up part of the markings on the plate. Car dealers throughout the State supply many of those frames to advertise their dealerships. A variety of other organizations do likewise.

In some instances, an entire phrase, like "Garden State," is covered by the frame. In other cases, only a very small part of "New Jersey" or "Garden State" is covered, and the words are entirely legible.

According to the State, those examples all have one thing in common: the cars' drivers have violated the law, and the police have the right to stop motorists and ticket them because part of the markings on their license plates are covered. Defendants argue that interpreting the law in that way presents multiple constitutional issues.

The relevant statute, N.J.S.A. 39:3-33, reads in part as follows: "No person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate . . . ." In recent years, more than 100,000 drivers annually have been ticketed for violating the statute, which also has other provisions. It is unclear how many more drivers

are stopped by the police pursuant to the statute, and charged with other offenses or let go without a ticket.

Police officers have unfettered discretion in deciding how to enforce the statute. The Attorney General was unaware of any guidance that directs an officer's exercise of discretion.

In the twin cases before the Court in these consolidated appeals, officers engaged in pretextual stops. They stopped each defendant because part of the license plate was covered; as the arresting officer in Roman-Rosado candidly conceded, though, the purpose of the stop was to try to develop a criminal investigation. The police found contraband in both cases -- drugs in one matter and a gun in the other -- which formed the grounds for defendants' convictions.

Defendants argue that, if read expansively, the relevant statute is unconstitutionally vague and overly broad, and also invites discriminatory enforcement. To avoid those serious concerns, we interpret the law narrowly. See State v. Pomianek, 221 N.J. 66, 90-91 (2015) (discussing the doctrine of constitutional avoidance). We hold that N.J.S.A. 39:3-33 requires that all markings on a license plate be legible or identifiable. If a frame conceals or obscures a marking in a way that it cannot reasonably be identified or discerned, the driver would be in violation of the law. In practice, if a

registration letter or number is not legible, the statute would apply; but if a phrase like "Garden State" is partly covered but still recognizable, there would be no violation.

Under that standard, defendant Darius Carter's license plate frame, which covered the phrase "Garden State" entirely, violated the law, so the stop was lawful. In contrast, defendant Miguel Roman-Rosado's plate frame did not cover "Garden State." It partially covered only ten or fifteen percent of the slogan, which was still fully legible, so the stop was unlawful.

In Roman-Rosado's case, the State argues in the alternative that the officer made a reasonable mistake of law in interpreting section 33. Relying on the Supreme Court's ruling in Heien v. North Carolina, 574 U.S. 54 (2014), the State submits that the stop and resulting conviction, based on a reasonable but mistaken interpretation of the law, should be upheld.

We decline to adopt the standard set forth in Heien under the New Jersey Constitution. The State Constitution is designed to protect individual rights, and it provides greater protection against unreasonable searches and seizures than the Fourth Amendment. Under Article I, Paragraph 7 of the State Constitution, it is simply not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute. Because there

was no lawful basis to stop Roman-Rosado, evidence seized as a direct result of the stop must be suppressed.

For reasons set forth more fully below, we modify and affirm the judgment of the Appellate Division in both cases.

I.

To recount the facts, we rely on the record of the suppression hearings.

A.

On September 28, 2014, one or more officers from the Pemberton Township Police Department stopped Darius Carter while he was driving. (It is unclear from the record how many officers were involved in the stop.) The words "Garden State" were covered on the car's license plate, and the basis for the stop was a suspected violation of N.J.S.A. 39:3-33.

Carter was driving without a license, and the police learned that he had two outstanding arrest warrants. The police arrested Carter and later found about one-half ounce of heroin and a small amount of cocaine on him.

A Burlington County grand jury indicted Carter and charged him with fourth-degree tampering with evidence, N.J.S.A. 2C:28-6(1), and four drug-related offenses.

Carter moved to suppress the drugs seized. Because the parties essentially agreed on the relevant facts, no testimony was presented at the

suppression hearing. The parties did not dispute that a license plate frame covered the words "Garden State" on the plate, and neither party argued that any other part of the plate was covered.

The trial court denied the motion to suppress. After reviewing an exhibit that depicted the license plate, the court found that the words "Garden State" were covered, but the rest of the plate was visible. The trial judge concluded the stop was pretextual but was "[n]onetheless . . . supported by the statute." The court found the law unambiguously barred concealing any markings on a license plate, not just the plate's registration numbers.

In connection with the above stop, Carter pled guilty on February 15, 2017 to second-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(2), one of the counts in the indictment. To resolve an unrelated indictment, he also pled to third-degree possession of a controlled dangerous substance with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3). He was sentenced to an aggregate term of ten years' imprisonment with a five-year period of parole ineligibility.

Carter appealed, and the Appellate Division affirmed his conviction and sentence. The court rejected Carter's argument that N.J.S.A. 39:3-33 is only violated "when the letters and numbers composing the vehicle's registration are obstructed." The court instead found that the statute's plain language

"expressly prohibits even the partial concealment of any marking on the license plate," including the words "Garden State."

B.

On April 17, 2016, a police officer from the Deptford Township Police Department stopped the car Miguel Roman-Rosado was driving. The officer testified he "was on a proactive detail" -- "stop[ping] a lot of cars for motor vehicle infractions and . . . then try[ing to] develop criminal investigations from that."

While driving right behind Roman-Rosado, the officer noticed a license plate bracket around the rear license plate that partially covered the words "Garden State." According to the officer, the frame covered about ten or fifteen percent of the bottom of the letters. Nonetheless, the officer said he could clearly recognize the words "Garden State." The testimony at the hearing focused only on those words. A redacted photo of the license plate and frame appear at Appendix A.

The officer stopped the car based on a suspected violation of N.J.S.A. 39:3-33. The car's registered owner was in the front passenger seat, and her child was in the right rear seat. When asked for his credentials, Roman-Rosado provided a state identification card but did not have a driver's license. The officer called dispatch and learned that Roman-Rosado had two

outstanding arrest warrants. The officer then called for backup to arrest Roman-Rosado.

Next, the officer asked Roman-Rosado to step out of the car. As he complied, the officer spotted "a white garment that looked like it had something bulky wrapped in it, shoved partially under the seat where [Roman-Rosado] was seated." Concerned for his safety, the officer reached into the car, removed the object, unwrapped it, and found an unloaded handgun. The officer then handcuffed Roman-Rosado and asked both passengers to step out of the car. A search of the rest of the car, based on the smell of burnt marijuana, turned up no other contraband.

A Gloucester County grand jury indicted Roman-Rosado and charged him with second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b). Roman-Rosado moved to suppress the handgun as the fruit of an unlawful stop.

At the end of the suppression hearing, at which the officer testified, the trial court denied defendant's motion. The court acknowledged there were "minimal, de minimis obstructions" on the plate -- a portion of the bottom of "Garden State" as well as "the top [of] the 'N' . . . [and] the 'J'" in New Jersey. "Without question," the judge found, the plate was "a readable license plate" that law enforcement "could very easily . . . run . . . to determine the

[car's] registration." Nonetheless, the court observed the statute barred the "obstruction of any marking on the" plate and did not allow for any "subjective interpretation by the officer." The trial court therefore concluded the stop was justified.

The court also upheld the seizure of the handgun. The trial judge credited the officer's testimony and noted that, with two people in the car, the "officer's safety . . . warrant[ed] securing that item."

On October 30, 2017, Roman-Rosado pled guilty to second-degree possession of a weapon by a person not permitted to do so, N.J.S.A. 2C:39-7(b)(1). The trial court sentenced him to five years' imprisonment with a mandatory five-year period of parole ineligibility.

The Appellate Division reversed defendant's conviction. State v. Roman-Rosado, 462 N.J. Super. 183, 190 (App. Div. 2020). The appellate court first analyzed the text of N.J.S.A. 39:3-33 -- specifically, its command that no license plate frame or holder conceal or obscure any markings on the plate. Based on the common meaning of those terms, the court concluded the statute is unambiguous and "prohibits the concealment and obfuscation of identifying information on license plates." Id. at 198. The Appellate Division added, "[w]e do not read the statute to establish a motor vehicle violation for

cosmetic license plate frames that make minimal contact with lettering on the license plate and do not make the plate any less legible." Ibid.

"By 'less legible,'" the court explained, "we mean an inability to discern critical identifying information imprinted on the license plate." Id. at 199. Otherwise, officers could stop cars with only "the slightest, and candidly insignificant, covering of 'Garden State' on a driver's rear license plate" -- an outcome the court considered absurd. Ibid.

In addition to the common understanding of the words in the statute, the court found support for its ruling from State in Interest of D.K., 360 N.J. Super. 49 (App. Div. 2003). Because the Appellate Division concluded that "[o]nly a license plate marking that is concealed or obscured, meaning it cannot readily be deciphered, constitutes a violation," the court found there was no reasonable basis for the police to stop Roman-Rosado's car. Id. at 199-200. As a result, the court held that the subsequent search of the car was unconstitutional, and the handgun should have been suppressed. Id. at 200. The Appellate Division therefore remanded the matter to allow Roman-Rosado the "opportunity to withdraw his guilty plea." Ibid.

Although the court recognized it was not necessary to address any additional arguments about whether the search was lawful, ibid., the Appellate

Division considered and rejected the claim that the search could be justified as a protective sweep, id. at 203-07.

C.

We granted defendants' petitions for certification. 241 N.J. 498 (2020); 241 N.J. 501 (2020). We also granted the American Civil Liberties Union of New Jersey (ACLU) and the Latino Leadership Alliance of New Jersey (LLA) leave to appear as amici curiae in both cases.

II.

Because the parties' arguments are substantially similar in both appeals, we summarize them together to the extent possible.

The Attorney General, on behalf of the State, argues that the police had reasonable suspicion to stop both defendants. The Attorney General relies on the plain language of N.J.S.A. 39:3-33 and submits the statute is violated whenever a frame or holder covers any part of any marking on a license plate, even if the plate is still readable. The Attorney General also contends the law applies to the words "Garden State" and not just the registration number on a plate.

In response to defendants' arguments, the Attorney General maintains the statute is constitutional. The Attorney General argues the law is neither overly broad, because it does not intrude upon any constitutionally protected

conduct, nor unconstitutionally vague, because the statute provides clear notice of the conduct it prohibits. The Attorney General also submits the law does not violate defendants' freedom of speech by prohibiting motorists from covering the state's motto, "Garden State."

The Attorney General argues in the alternative that the stops were lawful, even if the Court finds the officers' interpretation of the statute was incorrect, because they stemmed from objectively reasonable mistakes of law by the officers. In that regard, the Attorney General urges this Court to adopt the United States Supreme Court's holding in Heien.

In addition, the State maintains the seizure of the handgun in Roman-Rosado's case was part of a lawful protective sweep.

Defendants argue that the stops in both appeals were unlawful. They argue that N.J.S.A. 39:3-33, when read in its proper context, does not prohibit covering cosmetic slogans at the bottom of a license plate. According to defendants, the statute is designed to ensure that registration numbers are always visible, not images or slogans.

Such an interpretation, defendants contend, "rescues the statute from unconstitutionality." They argue the State's interpretation of the law renders it vague and overly broad, and invites arbitrary and capricious enforcement. They also contend that requiring drivers to display the phrase "Garden State"

violates their free speech rights under Wooley v. Maynard, 430 U.S. 705 (1977).

Defendants maintain that because a police officer's mistake of law cannot erase a violation of a person's constitutional rights, this Court should not adopt the reasonable mistake of law doctrine outlined in Heien.

Finally, Roman-Rosado contends that, after he was removed from the car, the police search of the vehicle was unconstitutional. As a result, defendant argues, the handgun should be suppressed.

The ACLU and LLA support defendants' arguments. They maintain that N.J.S.A. 39:3-33 is designed to help the police identify vehicles, an aim that is not furthered when officers stop drivers for license plate frames that cover slogans like "Garden State." The LLA also submits that the requirement to display "Garden State" on license plates was enacted to promote New Jersey's agricultural industry, not to advance public safety.

In addition, amici assert that, under the State's interpretation, N.J.S.A. 39:3-33 is unconstitutionally vague and overbroad, and opens the door to pretextual stops that disproportionately affect people of color. The Public Defender, on behalf of defendants, stresses the latter point as well.

Finally, amici ask the Court to reject Heien because the State Constitution provides greater protection than the Fourth Amendment.

III.

A.

We begin with the statutory scheme. The applicable law states that

> [n]o person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate or any part of any insert which the director, as hereinafter provided, issues to be inserted in and attached to that registration plate or marker.
>
> [N.J.S.A. 39:3-33, ¶ 3 (section 33).]

For a first offense, a driver can be fined up to $100 and, "[i]n default of the payment thereof," shall be imprisoned up to ten days in county jail. Id. ¶ 7. Both penalties are doubled for a second violation. Ibid.[1]

A related provision in Title 39 requires that the words "Garden State" "be imprinted" on license plates for passenger cars. N.J.S.A. 39:3-33.2 (instructing the Director of the Division of Motor Vehicles -- now the Motor Vehicle Commission (MVC), see N.J.S.A. 39:2A-2(y) -- to implement the

[1] Other sections of the law are not relevant to this appeal. They address the number and placement of license plates, N.J.S.A. 39:3-33, ¶ 1; require that plates "be kept clear and distinct and free from grease, dust or other blurring matter," id. ¶ 2; empower the Director to issue license plate inserts, id. ¶ 4; and prohibit the display of fictitious registration numbers or plates that resemble license plates "for the purpose of advertisement," id. ¶ 5. As noted above, references to "section 33" in this opinion relate to the statute's third paragraph.

requirement). Yet other statutes authorize the Director to issue specialty plates, which do not contain the phrase. See, e.g., N.J.S.A. 39:3-27.67 (Battleship U.S.S. New Jersey license plates); N.J.S.A. 39:3-27.85 (Pinelands Preservation license plates); N.J.S.A. 39:3-27.90 (Conquer Cancer license plates); N.J.S.A. 39:3-27.92 (Liberty State Park license plates); N.J.S.A. 39:3-27.123 (Law Enforcement Officer Memorial license plates); N.J.S.A. 39:3-27.127 (Be An Organ Donor license plates); N.J.S.A. 39:3-33.10 (Wildlife Conservation license plates).

In all, the MVC website lists scores of alternative designs to the standard "Garden State" plate. They include 17 "dedicated" plates (e.g., "Deborah Heart & Lung Center" and "Shore to Please"); 20 service organizations (e.g., the "American Legion" and "Disabled Vets"); 18 community organizations (e.g., "Kiwanis International" and "Rotarian"); 10 alumni organizations (e.g., "Rutgers" and "Seton Hall"); 13 military groups (e.g., "Army Reserve" and "Gold Star Family"); 4 volunteer workers (e.g., "First Aider" and "EMT"); 10 sports teams (e.g., "Mets" and "Phillies"); 11 NASCAR plates (e.g., "Dale Earnhardt, Sr." and "NASCAR Fan"); 6 professions (e.g., "Chiropractor" and "Physician"); and 2 special vehicle plates (for historic and antique cars). See N.J. Motor Vehicle Comm'n, Personalized Plates, https://www.state.nj.us/mvc/vehicles/personalized.htm (last visited July 30, 2021) (with sublinks for

dedicated, specialty, sports, and special vehicle plates, military personnel, volunteer workers, and professionals). For the alternative designs, a specialty slogan replaces the words "Garden State."

A companion statute to section 33 addresses dealerships, booster organizations, and other groups that supply license plate frames or holders:

> A person shall not sell, offer for sale, distribute, transfer, purchase, receive, or possess any merchandise, including but not limited to retractable license plate holders, reflective spray, or anti-photograph license plate covers, knowing that such merchandise is designed or intended to be used to conceal or degrade the legibility of any part of any marking imprinted upon a vehicle's license plate for the purpose of evading law enforcement. The penalty for a violation of this section shall be a fine not to exceed $500. . . .
>
> [N.J.S.A. 39:3-33c (section 33c).]

According to the Administrative Office of the Courts, the police issue more than 100,000 violation notices for section 33 in a year. In 2018, 117,265 summonses were issued; in 2019, 120,515 were issued. The data applies to the entire statute. Not a single violation notice was issued for section 33c from 2012 to 2019.

B.

To interpret section 33, we look to settled principles of statutory construction.

The overriding goal of statutory interpretation is to determine and give meaning to the Legislature's intent. State v. J.V., 242 N.J. 432, 442 (2020). We start with the language of the statute and give words their "generally accepted meaning." N.J.S.A. 1:1-1. We also read and construe words and phrases in their context. Ibid. Rather than review them in isolation, we consider the words of a statute "in context with related provisions so as to give sense to the legislation as a whole." DiProspero v. Penn, 183 N.J. 477, 492 (2005).

If the text of a law is clear, the "court's task is complete." State v. Lopez-Carrera, 245 N.J. 596, 613 (2021). If the language is ambiguous, courts may look to extrinsic sources, "including legislative history, committee reports, and other sources, to discern the Legislature's intent." Ibid. Courts also consider extrinsic aids "if a literal reading of the statute would yield an absurd result, particularly one at odds with the overall statutory scheme." Rozenblit v. Lyles, 245 N.J. 105, 122 (2021) (quoting Wilson by Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

If a statute "is susceptible to two reasonable interpretations, one constitutional and one not," the Court "assume[s] that the Legislature would want us to construe the statute in a way that conforms to the Constitution."

Pomianek, 221 N.J. at 90-91 (citing State v. Johnson, 166 N.J. 523, 534, 540-41 (2001)).

C.

The State contends that the statute's words are clear: a license plate frame cannot cover any part of any marking on a license plate. Defendants stress that section 33 bars the use of license plate frames or holders only insofar as they "conceal[] or otherwise obscure[]" certain markings, quoting N.J.S.A. 39:3-33, ¶ 3 (emphases added). Both sides present strong arguments.

To begin with, we note that the term "marking" in section 33 extends to any impressions on a license plate. We do not find support in the statutory scheme or the language of section 33 for the notion that "marking" refers only to a plate's registration numbers and letters.

Throughout the Motor Vehicle Code, the Legislature uses the term "marking" broadly. N.J.S.A. 39:3-27.67, for example, requires Battleship U.S.S. New Jersey specialty plates to display the image of a battleship "[i]n addition to the registration number and other markings of identification otherwise prescribed by law." (emphasis added). N.J.S.A. 39:3-33.10 uses similar language for Wildlife Conservation specialty plates, which must depict language or an emblem in support of wildlife conservation "in addition to the registration number and other markings or identification otherwise prescribed

by law." (emphasis added); accord N.J.S.A. 39:3-27.13 (New Jersey National Guard license plates); N.J.S.A. 39:3-27.79 (Shade Tree and Community Forest Preservation license plates); N.J.S.A. 39:3-27.116 (Promote Agriculture license plates); N.J.S.A. 39:3-27.141 (Gold Star Family license plates); see also N.J.S.A. 39:3-33.2 (instructing the MVC Director to imprint the words "Garden State" "in addition to other markings"). Under the Code, then, "marking" includes more than registration numbers.

We turn next to the language of section 33 and its key terms -- "conceal" and "obscure." As commonly used, "conceal" means "to prevent disclosure or recognition of," or "to place out of sight." Webster's Third New International Dictionary (Unabridged) 469 (1981); see also Black's Law Dictionary 360 (11th ed. 2019) (defining "concealment" as "[t]he act of preventing disclosure or refraining from disclosing," or "[t]he act of removing from sight or notice; hiding"); Ballentine's Law Dictionary 237 (3d ed. 1969) (defining "conceal" as "[t]o keep facts secret or withhold them from the knowledge of another; to hide or secrete physical objects from sight or observation").

To "obscure" typically means "to make dim," "to conceal or hide from view as by or as if by covering wholly or in part: make difficult to discern," or "to make unintelligible or vague." Webster's Third New International Dictionary at 1557. As an adjective, "obscure" is defined as "dark, dim," "not

readily perceived," "not readily understood: lacking clarity or legibility," and "lacking clarity or distinctness." Ibid.

In Roman-Rosado, the Appellate Division concluded the statute does not address "frames that make minimal contact with lettering on the license plate and do not make the plate any less legible." 462 N.J. Super. at 198. We agree. Countless license plate frames cover a small fraction of the top of "New Jersey," or the bottom of "Garden State," but the words can still be easily identified. That is not true if a frame instead covers a single letter or number of the registration marks in the center of a license plate. The operative words in the statute -- "conceal" and "obscure" -- when given their ordinary meaning, distinguish between those examples. See N.J.S.A. 39:3-33 ¶ 3. We understand the terms to focus on legibility, not on every minor covering of otherwise recognizable markings.

Reading the statute in that way also avoids absurd results. Drive on any highway in the state to see that a large number of license plate frames cover the very top of the letters "N" and "J" in "New Jersey" or the bottom of the letters in "Garden State." Under the State's interpretation of section 33, countless drivers could all be stopped by the police and be exposed to a fine or possible jail sentence. That reading of the law is at odds with the view that the Legislature "writes motor-vehicle laws in language that can be easily grasped

by the public so that every motorist can obey the rules of the road." State v. Scriven, 226 N.J. 20, 34 (2016).

That said, we recognize the force of the State's argument. We note, as well, that section 33 does not expressly include language about legibility. By contrast, section 33c, addressed to dealers and other suppliers, refers to frames "designed or intended to be used to conceal or degrade the legibility of any part of any marking imprinted upon a vehicle's license plate." N.J.S.A. 39:3-33c (emphasis added).

We therefore consider the statute's legislative history and defendants' constitutional claims as part of our analysis.

D.

The legislative history is not expansive and sheds little light on the scope of section 33. The third paragraph was introduced in 1989. See L. 1989, c. 132. The Sponsor's Statement accompanying an early version of the Assembly bill explained that a license plate frame or holder could not "conceal[] or obscure[] any of the information on the plate." Sponsor's Statement to A. 1245 (L. 1989, c. 132) (emphasis added). Neither the

statement nor any other documents relating to the law's passage expand on the meaning of its key terms.[2]

Amendments to other paragraphs of N.J.S.A. 39:3-33 reflect the Legislature's concern about the legibility of license plates. A series of amendments in 1968, 1981, and 1989 relate to the use of reflectorized license plates. See L. 1968, c. 363; L. 1981, c. 133; L. 1989, c. 202. In 1968, the Legislature required that license plates be treated with "reflectorized materials" "to increase the visibility and legibility thereof." L. 1968, c. 363. The law was repealed in 1973, see L. 1973, c. 164, and reenacted in 1981, see L. 1981, c. 133. In 1989, the Legislature mandated that fully reflectorized license plates bearing a new color scheme and style be reissued. See L. 1989, c. 202. The Sponsor's Statement explained that the new license plates "will be fully reflectorized for increased visibility and legibility." Sponsor's Statement to S. 835 (L. 1989, c. 202) (emphasis added). Senator Frank Graves, the bill's sponsor, reportedly explained that reflectorized plates would "save lives and help crime-fighting efforts" by allowing the police to "read license numbers

[2] The parties cite State v. Donis, in which this Court observed that "[t]he very purpose of [N.J.S.A. 39:3-33] is to identify the owner of a car should the need arise from his or her license plate." 157 N.J. 44, 55 (1998). For context, the comment followed a sentence about the "required . . . display of a license plate on both the front and rear of all cars registered in New Jersey." Ibid. (citing N.J.S.A. 39:3-33). The Court did not review the legislative history of section 33 in Donis.

more easily." Senate OKs Bills on License Plates, Dogs, Courier-Post, Nov. 21, 1989.[3]

IV.

A.

Defendants argue that a broad reading of section 33 does not pass constitutional muster. They advance several theories.

According to defendants, a law that criminalizes de minimis obstructions of phrases like "Garden State" serves no legitimate state interest and fails under the permissive rational basis test. "[A] statute that bears no rational relationship to a legitimate government goal and that arbitrarily deprives a person of a liberty interest or the right to pursue happiness is unconstitutional." State in Interest of C.K., 233 N.J. 44, 73 (2018).

[3] Amicus LLA highlights the legislative history of an accompanying statute -- N.J.S.A. 39:3-33.2 -- which requires that "Garden State" be printed on New Jersey license plates. According to the LLA, the history reveals the motto was introduced to promote the state's agricultural industry, not to enhance public safety. See Governor's Veto Message to Comm. Substitute for A. 250 (Aug. 17, 1953) (noting "the laudable purpose" of the bill was to "advertis[e] the natural advantages of our great State"). The LLA emphasizes that two governors vetoed the proposal before it eventually became law in 1954, out of a concern that the addition of "Garden State" would distract from the important function of license plates and reduce the space available for registration information. See ibid.; Governor's Veto Message for A. 454 (Aug. 2, 1954). The Legislature overrode the second veto. L. 1954, c. 221. That history, however, does not help resolve the issue raised in these appeals.

Defendants and amici contend as well that the statute, as interpreted by the State, is both unconstitutionally vague and overly broad. The two claims differ analytically:

> The vagueness concept . . . rests on principles of procedural due process; it demands that a law be sufficiently clear and precise so that people are given fair notice and adequate warning of the law's reach. The overbreadth concept, on the other hand, rests on principles of substantive due process; the question is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far. The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the state's interests.
>
> [Town Tobacconist v. Kimmelman, 94 N.J. 85, 125 n.21 (1983).]

Vague laws leave people guessing about their meaning. State v. Morrison, 227 N.J. 295, 314 (2016). As the Court explained in State v. Lee,

> [a] penal statute should not become a trap for a person of ordinary intelligence acting in good faith, but rather should give fair notice of conduct that is forbidden. A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary.
>
> [96 N.J. 156, 166 (1984) (citations omitted).]

Overly broad statutes suffer from a different flaw. They invite "excessive governmental intrusion into protected areas" by "extend[ing] too

far." Karins v. Atlantic City, 152 N.J. 532, 544 (1998) (quoting Petition of Soto, 236 N.J. Super. 303, 324 (App. Div. 1989)); see also Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) (noting that for the broad vagrancy law in question, "the net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police").

If a "statute 'reaches a substantial amount of constitutionally protected conduct,'" it can be invalidated. State v. Burkert, 231 N.J. 257, 276 (2017) (quoting State v. Mortimer, 135 N.J. 517, 530 (1994)). Rather than strike down a law on that ground, however, if the "statute is 'reasonably susceptible' to an interpretation that will render it constitutional," courts construe the law narrowly to remove any doubts about its constitutional validity. Id. at 277 (quoting State v. Profaci, 56 N.J. 346, 350 (1970)).

We agree that section 33, if read broadly, raises serious constitutional concerns. Roman-Rosado was stopped for driving a car with a license plate frame that covered ten to fifteen percent of the bottom of the phrase "Garden State." But the words, like the rest of the markings on the plate, were fully recognizable. Most people would have no idea that section 33 might apply in such a situation because the law does not give clear and precise notice that it reaches that far. See Town Tobacconist, 94 N.J. at 125 n.21.

License plate frames abound, and they invariably cover some part of the markings on the plates they surround. Frames supplied by dealerships, booster organizations, non-profit groups, and others often cover the bottom of "Garden State" or the very top of "New Jersey." Simply driving a car off the dealer's lot with that type of license plate frame would amount to a violation and give officers a basis to stop the car. And if the proposed broad reading of section 33 were the standard, tens if not hundreds of thousands of New Jersey drivers would be in violation of the law.

The State asserts section 33 serves a rational purpose and addresses a real concern: by outlawing frames that conceal or obscure any markings on a license plate, the statute enables civilians and police officers to recognize license plates at a glance. The State also contends that markings like "Garden State" need to be fully visible because license plates can be more difficult to identify from certain angles.

Despite those concerns, a broad reading of section 33 opens the door wide. Indeed, which of the hundreds of thousands of cars on the road should officers pull over under the broad reading of the law the State advances? The Attorney General could point to no guidance that directs police officers how to enforce the statute. And limitless discretion can invite pretextual stops, like

the stops in both cases here. It can also lead to arbitrary and discriminatory enforcement.

It is cause for concern, as well, that despite the State's frequent use of section 33 to stop drivers, no summonses were issued under N.J.S.A. 39:3-33c from 2012 through 2019. As noted above, that statute bars the sale or transfer of license plate holders "designed or intended to be used to conceal or degrade the legibility of any part of any marking imprinted upon a vehicle's license plate for the purpose of evading law enforcement." N.J.S.A. 39:3-33c.

N.J.S.A. 39:3-33c includes two elements missing from section 33 -- a focus on legibility and a purpose to evade law enforcement -- which might account for the law's limited use. But the State can take other steps to compel car dealerships and other organizations to stop distributing and selling license plate frames that the State believes violate section 33. It has not done so.

Law enforcement commonly attacks problems at their source. In the area of drug enforcement, for example, successful enforcement strategies target kingpins and suppliers to stem the flow of drugs, not just low-level users. Yet here, rather than take any action against the source of the offending frames, motorists by the thousands are pulled over each year.

To the extent section 33 has two meanings -- a narrow one that focuses on whether a license plate is legible, and a broader one that raises serious

constitutional issues -- the doctrine of constitutional avoidance calls for a narrow interpretation. Pomianek, 221 N.J. at 90-91. Because "we assume that the Legislature would want us to construe the statute in a way that conforms to the Constitution," we adopt the narrower reading. Id. at 91.

We therefore hold that section 33 requires that all markings on a license plate be legible or identifiable. That interpretation is consistent with the plain meaning of the statute's wording. If a license plate frame or holder conceals or obscures a marking such that a person cannot reasonably identify or discern the imprinted information, the driver would be in violation of the law. See Roman-Rosado, 462 N.J. Super. at 199; see also D.K., 360 N.J. Super. at 53 (noting in dicta that the term "obscure" in section 33 means to make a license plate "less legible").

In other words, a frame cannot cover any of the plate's features to the point that a person cannot reasonably identify a marking. So, for example, if even a part of a single registration letter or number on a license plate is covered and not legible, the statute would apply because each of those characters is a separate marking. If "Garden State," "New Jersey," or some other phrase is covered to the point that the phrase cannot be identified, the law would likewise apply. But if those phrases were partly covered yet still recognizable, there would be no violation.

When applying the above test, trial courts will be asked to evaluate whether license plate markings are legible or identifiable from the perspective of an objectively reasonable person. Cf. State v. Stovall, 170 N.J. 346, 356-57 (2002) (noting that reasonable suspicion to justify an investigatory stop is viewed from the standpoint of an objectively reasonable officer). That judgment can be based on still photos or videos, like the evidence presented in these appeals.

B.

Applying the above test here, Roman-Rosado did not violate the statute. The officer who stopped Roman-Rosado testified that only ten or fifteen percent of the words "Garden State" were obstructed, and he conceded he could clearly identify the phrase on the license plate. The trial judge found the plate was "without question" "a readable license plate." See Appendix A. Because "Garden State" was not "conceal[ed] or otherwise obscur[ed]" within the meaning of section 33, and all features of the plate were legible, the Appellate Division properly concluded the stop was unlawful.

In Carter's case, however, it is undisputed that "Garden State" was entirely covered. As a result, the plate violated the statute, and law enforcement officers had the right to stop Carter. See Scriven, 226 N.J. at 33-

34 (noting that an officer's reasonable and articulable suspicion that a driver of a car is committing a motor-vehicle violation justifies a stop).

We do not find persuasive Carter's argument that the statute violated his rights under the First Amendment by requiring him to display the state motto, "Garden State." Carter relies on the United States Supreme Court's decision in Wooley. In that case, the Court succinctly stated the issue before it: "whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs." Wooley, 430 U.S. at 706-07 (emphasis added).

George and Maxine Maynard had filed an action in federal court to enjoin the state's enforcement of laws that (1) required license plates for noncommercial cars to be embossed with the state motto, and (2) made it a misdemeanor to obscure any letters on a license plate, which included the motto. Id. at 707, 709 (citing N.H. Rev. Stat. Ann. §§ 263:1, 262:27-c). George Maynard had been charged with a violation for covering up the motto on three occasions in five weeks. Id. at 708.

The Maynards were "followers of the Jehovah's Witnesses faith," id. at 707, and George Maynard filed an affidavit with the district court that stated, "I refuse to be coerced by the State into advertising a slogan which I find

morally, ethically, religiously and politically abhorrent." Id. at 709, 713. The Supreme Court affirmed the district court and ruled in favor of the Maynards. The Supreme Court held,

> New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message – or suffer a penalty, as Maynard already has. . . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.
>
> [Id. at 715 (emphases added).]

The Court therefore concluded that New Hampshire could not require the Maynards "to display the state motto upon their vehicle license plates." Id. at 717.

Wooley thus involved two components: (1) compelled speech by the government; and (2) content a party disagreed with. And in a variety of cases, the Supreme Court has suggested that challengers should voice some objection to the content of the speech in question. See Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (stating that the government unlawfully compels speech when "an individual is obliged personally to express a message he disagrees with, imposed by the government"); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219 (2015) (noting that the First Amendment "limits a State's authority to compel a private party to

express a view with which the private party disagrees"); Janus v. AFSCME, Council 31, 585 U.S. ___, 138 S. Ct. 2448, 2464 (2018) (stating that the aims of free speech are undermined when "the Federal Government or a State . . . compels [individuals] to voice ideas with which they disagree"); see also Cressman v. Thompson, 798 F.3d 938, 963 (10th Cir. 2015) (stating, in a case involving symbolic speech, that "merely objecting to the fact that the government has required speech is not enough; instead, a party must allege some disagreement with the viewpoint conveyed by this speech").

Carter argues generally that section 33 violates his First Amendment rights because the law bars individuals from covering "Garden State" on a license plate. Unlike in Wooley, the record before this Court does not include any statement or certification that Carter disagrees with the expression "Garden State" or finds it "morally objectionable." Wooley, 430 U.S. at 715. We therefore decline to consider his First Amendment argument further.

V.

Because we find that Roman-Rosado did not violate the statute, we next consider the appropriate remedy in his case. That requires the Court to evaluate the reasonable mistake of law doctrine.

A.

The Fourth Amendment and Article I, Paragraph 7 of the State Constitution guarantee individuals the right to be free from unreasonable searches and seizures. Both provide that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. "A motor-vehicle stop by the police" constitutes a seizure. Scriven, 226 N.J. at 33. To justify a stop, an "officer must have a reasonable and articulable suspicion that the driver . . . is committing a motor-vehicle violation" or some other offense. Id. at 33-34.

The sole basis for Roman-Rosado's stop was his alleged violation of section 33. But, for reasons that are explained above, he did not violate the law. The State argues that even if the officer's interpretation of section 33 was mistaken, his mistake was objectively reasonable and the stop was therefore lawful. The State relies on the United States Supreme Court's holding in Heien, which it asks this Court to adopt.

In Heien, the Supreme Court held that a police officer's mistake of law can give rise to the reasonable suspicion needed to justify a traffic stop under the Fourth Amendment. 574 U.S. at 57. In the case, an officer pulled over a car after noticing that its right brake light did not work. Ibid. The car's

owner, Nicholas Brady Heien, gave consent for the police to search the car. Id. at 58. Officers found cocaine and charged Heien with attempted trafficking of cocaine. Ibid.

Heien moved to suppress the evidence seized. He argued that the stop and search of the car violated the Fourth Amendment. Ibid. The trial court denied the motion and held that the faulty brake light gave the officer reasonable suspicion to stop the car. Ibid.

The North Carolina Court of Appeals reversed. State v. Heien, 714 S.E.2d 827, 831 (N.C. Ct. App. 2011). It held that the initial car stop was invalid because driving with one working brake light did not actually violate the applicable North Carolina statute. Ibid. Because the statute required cars to have "a stop lamp," which the law also referred to as "[t]he stop lamp," the court concluded that Heien's car needed only one working brake light. Id. at 830-31 (emphases added) (citing N.C. Gen. Stat. § 20-129(g) (2009)). Accordingly, the appellate court held that the stop was "objectively unreasonable" and violated the Fourth Amendment. Id. at 831.

The North Carolina Supreme Court reversed the appellate court. State v. Heien, 737 S.E.2d 351, 352 (N.C. 2012). The state supreme court assumed, for the purposes of the appeal, that a single faulty brake light did not violate the statute. Id. at 354. But in light of related provisions in the code, the court

held that the officer could have reasonably, yet mistakenly, read the statute to require two working brake lights. Id. at 358-59. Because the officer's mistaken interpretation of the law was reasonable, the North Carolina Supreme Court held the stop did not violate the Fourth Amendment. Id. at 359.

The United States Supreme Court agreed. It held that an objectively reasonable mistake of law can give rise to reasonable suspicion and sustain a stop under the Fourth Amendment. Heien, 574 U.S. at 60, 67-68. Writing for the majority, Chief Justice Roberts observed that "the ultimate touchstone of the Fourth Amendment is 'reasonableness'" and that reasonable suspicion does not demand perfection. Id. at 60 (quoting Riley v. California, 573 U.S. 373, 381 (2014)).

The Supreme Court recounted "that searches and seizures based on mistakes of fact can be reasonable." Id. at 61. The Court added that "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion." Ibid. As the Chief Justice explained,

> [w]hether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

[Ibid.]

The majority emphasized that "[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes -- whether of fact or of law -- must be objectively reasonable." Id. at 66. They cannot be based on "the subjective understanding of the particular officer involved." Ibid. Based on the language of the statute, the Supreme Court held that it was "objectively reasonable for [the] officer . . . to think that Heien's faulty right brake light was a violation of North Carolina law. And because the mistake of law was reasonable, there was reasonable suspicion justifying the stop." Id. at 67-68.

Justice Kagan wrote a concurring opinion. Id. at 68-71 (Kagan, J., concurring). She agreed with the majority that the traffic stop did not violate the Fourth Amendment, id. at 68, 71, but underscored "important limitations" as to when an officer's mistake of law is objectively reasonable, id. at 69. Justice Kagan outlined the following limiting standard:

> If [a] statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake. But if not, not. . . . [T]he statute must pose a really difficult or very hard question of statutory interpretation. And indeed, both North Carolina and the Solicitor General agreed that such cases will be exceedingly rare.
>
> [Id. at 70 (quotations omitted).]

Justice Sotomayor dissented. Id. at 71-80 (Sotomayor, J., dissenting). In her view, "determining whether a search or seizure is reasonable requires evaluating an officer's understanding of the facts against the actual state of the law." Id. at 71. After surveying the case law, Justice Sotomayor concluded "there is nothing . . . requiring us to hold that a reasonable mistake of law can justify a seizure under the Fourth Amendment, and quite a bit suggesting just the opposite." Id. at 76.

The reasonableness inquiry at the core of the Fourth Amendment, the dissent observed, has "been focused on officers' understanding of the facts." Id. at 72. And "it has been justified in large part based on the recognition that officers are generally in a superior position, relative to courts, to evaluate those facts and their significance as they unfold." Ibid. The mistake of fact doctrine, the dissent explained, springs from the "recognition that police officers operating in the field have to make quick decisions." Id. at 73 (citing Illinois v. Rodriguez, 497 U.S. 177, 186 (1990)). The doctrine also stems from an "understanding that police officers have the expertise to 'dra[w] inferences and mak[e] deductions . . . that might well elude an untrained person.'" Ibid. (alterations and omission in original) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

By contrast, Justice Sotomayor noted, "the meaning of the law is not probabilistic in the same way that factual determinations are." Ibid. It is "definite and knowable," and it is for the courts, not officers, to interpret. Ibid. (quoting Cheek v. United States, 498 U.S. 192, 199 (1991)).

Justice Sotomayor warned that the majority's decision would "erod[e] the Fourth Amendment's protection of civil liberties," ibid., have "the perverse effect of preventing or delaying the clarification of the law," id. at 74, and cause "innocent citizen[s] . . . to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question," id. at 79. For those reasons, the dissent "would . . . hold that an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment." Id. at 80.

This Court adopted the reasonable mistake of fact doctrine in State v. Sutherland. See 231 N.J. 429, 431, 437 (2018) ("[A] reasonable mistake of fact on the part of a police officer will not render a search or arrest predicated on that mistake unconstitutional." (citing State v. Handy, 206 N.J. 39, 53-54 (2011))). We have twice declined invitations to adopt the reasonable mistake of law doctrine set forth in Heien.

In both cases, we found the statutes in question were clear, and the officers' interpretations were not objectively reasonable. Id. at 444-45

(finding that a car stop for a supposed violation of statutes requiring two working rear lamps -- one on each side -- was not a reasonable mistake of law because the statutes were clear and the driver had two functioning rear lamps); Scriven, 226 N.J. at 35-36 (finding that a car stop for a supposed violation of a statute requiring drivers to dim their high beams when approaching "an oncoming vehicle" was not a reasonable mistake of law because the statute was clear and the driver was not approaching any vehicles). As a result, we had no reason to consider Heien's holding in either case.

Here, both parties have presented strong arguments about the scope of section 33. Faced with statutory language that was not entirely clear, a police officer could reasonably, but mistakenly, have thought the statute barred any covering of a marking on a license plate, even if the plate was fully legible. Under the circumstances, then, we must consider the reasonable mistake of law doctrine for the first time.

We do not question the Supreme Court's interpretation of the Fourth Amendment. The United States Supreme Court is the final arbiter of the Federal Constitution. See Comm. to Recall Robert Menendez From the Off. of U.S. Senator v. Wells, 204 N.J. 79, 131 (2010). Instead, we consider whether the doctrine comports with the State Constitution.

B.

1.

In our federalist system, state constitutions can be a source of more expansive individual liberties than what the Federal Constitution confers. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980); State v. Novembrino, 105 N.J. 95, 144-45 (1987); see also Stewart G. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 707 (1983) (throughout); William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) (throughout); Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 7-10, 16-21 (2018).

On a number of occasions, this Court has found that the New Jersey Constitution "affords our citizens greater protection against unreasonable searches and seizures" than the Fourth Amendment does. Novembrino, 105 N.J. at 145 (citations omitted); e.g., State v. Earls, 214 N.J. 564, 588 (2013) (requiring a search warrant for cell phone location data); State v. Reid, 194 N.J. 386, 389 (2008) (recognizing a reasonable expectation of privacy in internet subscriber information); State v. McAllister, 184 N.J. 17, 19 (2005) (finding a reasonable expectation of privacy in bank records); State v. Carty, 170 N.J. 632, 635 (2002) (requiring officers to have a reasonable and

articulable suspicion of criminal activity before they may request consent to search a car stopped for a motor vehicle infraction), modified on other grounds, 174 N.J. 351 (2002); State v. Mollica, 114 N.J. 329, 344-45 (1989) (finding a privacy interest in hotel-room telephone toll or billing records); State v. Johnson, 68 N.J. 349, 353-54 (1975) (requiring the State to prove that a person has "knowledge of the right to refuse consent" to establish consent to search).

The Court's decision in Novembrino followed the same principle in declining to adopt a good-faith exception to the exclusionary rule under the State Constitution. 105 N.J. at 157-59. The ruling departed from United States v. Leon, 468 U.S. 897 (1984), which established the exception under federal law.

The Novembrino Court's decision to find stronger protections under the State Constitution was "strongly influenced by . . . the likely impact of [the ruling] on the privacy rights of our citizens and the enforcement of our criminal laws." Id. at 146. As the Court explained,

> [t]he exclusionary rule . . . has become an integral element of our state-constitutional guarantee that search warrants will not issue without probable cause. Its function is not merely to deter police misconduct. The rule also serves as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches. Because we believe that the good-faith exception to the exclusionary rule adopted

> in Leon would tend to undermine the constitutionally-guaranteed standard of probable cause, and in the process disrupt the highly effective procedures employed by our criminal justice system to accommodate that constitutional guarantee without impairing law enforcement, we decline to recognize a good-faith exception to the exclusionary rule.
>
> [Id. at 157-58 (footnote omitted).]

2.

In Roman-Rosado's appeal, which implicates the federal reasonable mistake of law doctrine outlined in Heien, the State argues that officers should not be penalized for mistakenly interpreting laws that are less than clear. But that argument begs another question: should individuals stopped for a supposed "offense" that is not a crime be penalized under the New Jersey Constitution?

The State Constitution favors the protection of individual rights and is designed to vindicate them. Under our Constitution, people have the right to be free from unreasonable searches and seizures, and they suffer real harm when their rights are violated. The key issue under New Jersey's Constitution, then, is not whether an officer reasonably erred about the meaning of a law. It is whether a person's rights have been violated.

The protections against unreasonable searches and seizures guaranteed by Article I, Paragraph 7 encompass a simple notion -- that an actual law the

police are obligated to enforce may have been violated. Within that broad frame, there is room for debate about whether certain behavior amounts to reasonable suspicion or probable cause to believe that a crime has been committed. But no one would argue it is reasonable for the police to stop someone for violating a hypothetical law or a law that was never enacted. Just the same, it is not reasonable to restrict a person's liberty or invade their privacy for behavior that no statute condemns.

An officer's reasonable but mistaken interpretation of a statute cannot change the fact that the law does not criminalize particular conduct. In other words, if a law does not establish an offense altogether, the reasonable nature of an officer's mistake cannot transform an officer's error into reasonable suspicion that a crime has been committed. If officers could search and seize a person under those circumstances, reasonable, good faith errors would erode individual rights that the State Constitution guarantees.

At its core, the State Constitution stands for critical principles such as the rule of law and equal justice under the law. Those concepts encourage the uniform and fair enforcement of a system of laws. To be faithful to those ideals, we depend on legislators to craft clear statutes. We call on officers to learn the law in advance and enforce it correctly. And we count on judges to

interpret and uphold laws as written -- not to validate an officer's mistaken view of the law, even if reasonable, that intrudes on a person's liberty.

Such an approach does not penalize law enforcement officers. Although they may need to make difficult judgment calls when enforcing laws that are not entirely clear, they suffer no penalty if they make a reasonable mistake. See Heien, 574 U.S. at 75 (Sotomayor, J., dissenting). That cannot be said of individuals who are stopped or searched based on a mistaken interpretation of the law. They cannot tailor their behavior in advance to abide by what an officer might reasonably, but mistakenly, believe the law says. And if they are then stopped -- without notice -- for conduct that no law proscribes, they suffer real harm.

Courts in several other states have likewise declined to adopt Heien's reasonable mistake of law exception under their state constitutions. See State v. Coleman, 890 N.W.2d 284, 298 n.2 (Iowa 2017) (stating that the Court's prior holding rejecting the reasonable mistake of law doctrine "under the Iowa Constitution is unaffected by Heien"); State v. Pettit, 406 P.3d 370, 375-76 (Idaho Ct. App. 2017) ("[T]he Court declines to follow Heien . . . and adopt a good faith exception for an officer's objectively reasonable mistake of law.");

State v. Carson, 404 P.3d 1017, 1019 n.2 (Or. Ct. App. 2017) ("declin[ing] the state's invitation to revisit [the court's] prior holdings" and follow Heien).[4]

We therefore decline to adopt a reasonable mistake of law exception under the New Jersey Constitution.

C.

Under the exclusionary rule, evidence seized as a direct result of the State's unconstitutional action must be suppressed. Wong Sun v. United States, 371 U.S. 471, 485 (1963); State v. Bryant, 227 N.J. 60, 71 (2016). The seizure of the handgun in Roman-Rosado's case -- following an unjustified car stop -- must therefore be suppressed.

In light of our disposition of the above issues, we need not decide whether the officers had a basis to conduct a protective sweep.

VI.

For the reasons set forth above, we modify and affirm the judgments in both cases.

[4] Prior to Heien, at least five state supreme courts and five U.S. Courts of Appeals "held that police mistakes of law are not a factor in the reasonableness inquiry." See Heien, 574 U.S. at 74 n.1 (Sotomayor, J., dissenting) (collecting cases). A number of states have since adopted the Supreme Court's holding in Heien. See Sutherland, 231 N.J. at 441 (collecting cases). Others have followed or acknowledged Justice Kagan's narrower interpretation. See id. at 442 (collecting cases).

JUSTICES LaVECCHIA, ALBIN, PATTERSON, FERNANDEZ-VINA, SOLOMON, and PIERRE-LOUIS join in CHIEF JUSTICE RABNER's opinion.

Appendix A